Petition

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In the Supreme Court of the United States

OCTOBER TERM, 1981

EDWARD DENNIS JACKS, JR.,

Petitioner,

vs.

JACK R. DUCKWORTH, Warden,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JULIUS LUCIUS ECHELES
35 East Wacker Drive
Chicago, Illinois 60601
312-782-0711

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, N. C. 27514
919-962-5106

Counsel for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTIONS PRESENTED

1. Where, in a state court murder trial, a constitutionally impermissible jury instruction is given to the effect that every one is presumed to intend the natural consequences of voluntary acts, does the addition of such words as "unless the circumstances are such as to indicate the absence of such intent" save the instruction from invalidation under the Due Process Clause of the Fourteenth Amendment?

2. Whether, in a state court murder trial in which insanity is the sole defense, the admission into evidence and the reading to the jury of a portion of a recorded police interrogation conducted after *Miranda* warnings have been given, a portion that ends with the defendant's request "to talk to my attorney," constitute an impermissible exploitation of the defendant's right to remain silent, in violation of the Due Process Clause of the Fourteenth Amendment.

3. Where a phone conversation has been intercepted in conceded violation of Title III of the Omnibus Crime Control Act of 1968, can the taped conversation be introduced into evidence in a state court murder trial and used for any reason without regard to the provision of Section 2515 of that Act, 18 U.S.C. §2515, that outlaws the receipt in evidence in any state or federal court proceeding of communications illegally intercepted?

4. Whether a conceded violation of Section 2515 of Title III of the Omnibus Crime Control Act of 1968 is cognizable in a federal habeas corpus proceeding brought by a state prisoner pursuant to 28 U.S.C. §2254(a).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner Edward Dennis Jacks, Jr., prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 10, 1981.

OPINIONS BELOW

The opinion of the Seventh Circuit, entered on June 10, 1981, is reported at 651 F.2d 480. It is reprinted in the Appendix, pp. 1-30, *infra,* App. A.

The opinion of the United States District Court for the Northern District of Indiana, entered on April 11, 1980, is reported at 486 F.Supp. 1366. It is reprinted in the Appendix hereto, pp. 31-56, *infra,* App. B.

The opinion of the Supreme Court of Indiana, entered on September 26, 1979, is reported at ..... Ind. ....., 394 N.E.2d 166. It is reprinted in the Appendix hereto, pp. 59-77, *infra,* App. C.

JURISDICTION

This habeas corpus action, brought pursuant to 28 U.S.C. §2254, commenced in the United States District Court for the Northern District of Indiana. Habeas corpus relief was denied and the case dismissed on April 11, 1980. 486 F.Supp. 1366; App. B, *infra.* All state remedies had previously been exhausted. 394 N.E.2d 166 (Ind. 1979); App. C, *infra.*

By a 2-1 vote the Seventh Circuit affirmed the District Court's order denying habeas corpus, the judgment and opinion to that effect being entered on June 10, 1981. 651 F.2d 480; App. A, *infra.* On August 14, 1981, the Seventh Circuit entered an order denying a petition for rehearing, as well as a suggestion for rehearing in banc. App. p. 58, *infra.* This petition for certiorari is filed within 90 days of the denial of rehearing. See *Riddle* v. *Dyche,* 262 U.S. 333, 335-6 (1923) (habeas corpus is an independent civil action, not part of the original criminal prosecution).

CONTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the United States Constitution and of the federal statutes are as follows:

Amendment IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V: No person . . . shall be compelled in any criminal case to be a witness against himself, . . .

Amendment VI: In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.

Amendment XIV, Section 1: . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

Section 802, Title III, Omnibus Crime Control Act of 1968, 18 U.S.C. §2515: Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Federal habeas corpus statute, 28 U.S.C. §2254(a): The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of

habeas corpus in behalf of any person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws of the United States.

STATEMENT OF THE CASE

This federal habeas corpus proceeding stems from a finding of an Indiana state court jury, rendered in November of 1976, that the petitioner Jacks was guilty of the first degree murder of his wife. The rifle killing had occurred on August 28, 1975, and petitioner had been arrested at the scene. Following the jury verdict petitioner was sentenced to life imprisonment.

A. *Events at trial*

At the trial, petitioner consistently maintained that he had no recollection of the shooting; he testified that he first became aware of what happened when he saw his wife lying on the driveway of his home. See R. 692-4. His main defense was that he was not criminally responsible by reason of insanity at the time of the killing.

The Indiana Supreme Court later commented, 394 N.E.2d at 172, App. C, pp. 59-77, *infra*, that "conflicting expert and lay testimony was presented on this [insanity] subject" and that the expert witnesses who did testify on the issue of petitioner's sanity "were in conflict as to their findings." Nevertheless, on the direct appeal, the Indiana court concluded that the jury had before it ample facts and inferences "from which it could find beyond a reasonable doubt that the defendant was sane at the time of the commission of this act." *Ibid.*

The State had presented its evidence of sanity in execution of its burden of proving the critical element of in-

tent. As Circuit Judge Swygert noted in his dissent below, App. A, pp. 26-27, *infra*, "under Indiana law intent is one of the constituent elements of first-degree murder, the crime for which Jacks was convicted." Thus, when Jacks pleaded insanity as a defense, which goes to intent, the State's burden became one of proving sanity at the time of the act. These elementary concepts were to have important bearings on certain other trial events.

Introduction of tape-recorded conversation with police. Petitioner's first asserted ground for habeas corpus relief involved a portion of a tape-recorded conversation between himself and Detective Sergeant Miller. This conversation took place at the police station after petitioner's arrest on August 28, 1975. The portion admitted into evidence is set forth verbatim as Appendix A to the majority opinion below. App. A, pp. 15-18, *infra*.

Sergeant Miller gave petitioner his *Miranda* warnings at the outset of this conversation; but petitioner did not then invoke his right to remain silent or his right to have an attorney present. Petitioner then continued to give Sergeant Miller basic information, such as his name, age, address and occupation. Thereafter the following colloquy took place:

> Mr. Miller: Do you know what has happened? Tonight?
>
> Mr. Jacks: I'm not exactly sure what happened.
>
> Mr. Miller: You're not exactly sure. Have you been drinking?
>
> Mr. Jacks: As regards whatever happened this evening, I want to talk to my attorney.
>
> Mr. Miller: Okay.

Thereafter petitioner Jacks continued to engage in a conversation with Sergeant Miller; this additional con-

versation is set forth as Appendix B to the majority opinion below. App. A, pp. 18-20, *infra*. The trial court admitted into evidence that portion of the conversation (set forth in the aforesaid Appendix A) that ended with the colloquy above. The jury thus heard Jacks' request for an attorney. But everything after that request (set forth in the aforesaid Appendix B) was excluded. According to the majority opinion below, App. A, p. 3, *infra*, the Appendix A conversation was "offered for supposed admissions and denials therein." At the end of the suppressed Appendix B conversation, Sergeant Miller stated that the accused "was advised of his rights and desired to have an attorney before talking [further] to the police." App. A, p. 20, *infra*.

Introduction of tape-recorded telephone conversation. The jury was also allowed to hear an illegal tape recording of a telephone conversation between petitioner Jacks and his mother on the night of his arrest. The taped conversation is set forth in full in the opinion of the Indiana Supreme Court. 394 N.E.2d at 170; App. C, pp. 63-64, *infra*.

This conversation was recorded without a court order, and the State concedes that the conversation could not be used as part of its case in chief. The petitioner claimed that the taped conversation should have been excluded from evidence under Title III of the Omnibus Crime Control Act of 1968; Section 802 (18 U.S.C. §2515) of that Act provides that whenever any wire communication has been intercepted, "no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any [state court] trial . . . if the disclosure of that information would be in violation of this chapter."

As explained by the Indiana court, 394 N.E.2d at 169-170, App. C, p. 62, *infra,* the State offered this tape recording into evidence, after the defense rested, in order to rebut the credibility of the petitioner's mother "regarding her testimony concerning the telephone conversation." The recording was also offered, according to the Indiana court, to rebut petitioner's credibility regarding his statements about his mental condition at the time. The Indiana court added that the trial court permitted the tape to be played to the jury "after admonishing and instructing them that it could be considered only for the purpose of impeaching Helen Jacks' [the mother's] and appellant's credibility, and was not to be considered as evidence of the commission of the act." *Ibid.*

The judges of the Seventh Circuit took somewhat different views of the purpose of playing the tape to the jury, as well as the judge's instructions. The majority opinion asserted that the trial judge had noted that the tape "dealt with petitioner's and his mother's testimony on direct examination" and had "admonished the jury that the contents of the tape should be considered only to determine the credibility of petitioner and his mother *and on the issue of petitioner's sanity,* but not as to whether petitioner had committed the crime charged." App. A, p. 7, *infra,* emphasis added. The majority opinion, in n. 3, thereby rejected the State's view that the instruction did not permit the jury to consider the tape "independently on the issue of his sanity," that the tape was to be considered only as "to the credibility of petitioner and his mother as to their testimony on his mental condition."

Circuit Judge Swygert, in dissent, asserted that the "instruction to the jury that it could consider the contents of the tape for the question of petitioner's sanity,

but not as to whether Jacks had committed the crime charged, is gross error." App. A, p. 29, *infra*.

The instruction in question, which is not set forth verbatim in the opinion below, was given in two different versions at different parts of the trial. Petitioner's mother at one point had testified that she had talked on the phone with Jacks on one occasion, August 27, the day before the shooting. R. 644. At that point the defense had no knowledge of the existence of the illegally taped conversation. But the prosecutor proceeded to read into the record much of the substance of the August 28 tape, apparently on theory that it would impeach the mother's testimony that the prosecutor perceived as indicating that there had been only one mother-son conversation at this time, the August 27 conversation. R. 645-51. The jury was thereupon instructed that the mother's questions and answers with respect to the August 28 conversation "shall be considered by you only as to the credibility or lack of credibility of the witness and not as to the guilty or innocence of the defendant." R. 658. Later, while seeking to impeach the petitioner, the prosecutor again substantially read the August 28 conversation into the record. R. 706-710.

The trial court, after a hearing outside the presence of the jury, denied petitioner's motion for a mistrial due to the State's use of the non-disclosed tape. R. 719-720. Later, the entire tape was admitted into evidence and was thereupon heard by the jury. At this point the judge instructed that the illegally taped conversation

> . . . shall be considered by you for the purpose of determining the credibility or lack of credibility of the witness, Helen Jacks, and the defendant, Jacks, *and on the issue of the sanity or insanity of the defendant, Jacks,* and not as to whether the crime charged has, in fact, been committed. (R. 847-8; emphasis added.)

All objections to the playing of this tape due to the admitted violation of Title III (18 U.S.C. §2515) having been overruled, the prosecutor proceeded in his closing argument to the jury again to read the illegally intercepted phone conversation of August 28. R. 931-3.

All the use made of the illegal tape lends weight to the Seventh Circuit's perception of the above-quoted instruction, as one allowing the jury to consider the contents of the tape on the issue of insanity, as well as on credibility matters. Such use, of course, belies the prosecutor's repeated statements that "There is no question that the state could not have introduced this tape as a part of the state's case in chief," and that "It's only on rebuttal that the state has the opportunity to, in fact, introduce illegal evidence." R. 838.

The instructions as to presuming the natural consequences of voluntary acts.

Over the objection of the petitioner, the trial judge gave to the jury State's Instruction No. 5, set out in full in Appendix C to the majority opinion below. App. A, p. 22, *infra*. The critical portion of this instruction reads:

> You are instructed that where a specific intent is required to make an act an offense, such as in the charge preferred against the Defendant, it is not always possible to prove a purpose by direct evidence, for purpose and intent are subjective facts. That is, they exist within the mind of man, and since you cannot delve into a person's mind and determine his purpose and intent, you may look to all the surrounding circumstances, including what was said and done in relation thereto; bearing in mind *the presumption of law, that every one is presumed to intend the natural and probable consequences of his voluntary acts, unless the circumstances are such as to indicate the absence of such intent.* [Emphasis added.]

In addition, the emphasized language in State's Instruction No. 5—but without benefit of the last "unless" clause —was repeated in Court's Instruction No. 13, also given to the jury. The petitioner did not make a timely objection to No. 13, causing the majority below to rule that he had thereby waived the right to object under Indiana law. See App. A, p. 9, *infra*. Nevertheless, No. 13 appears in full in Appendix C to the majority opinion below, App. A, p. 21, *infra*, and reads:

> The Court instructs you that it is unlawful to intentionally commit an act forbidden by law which takes the life of another human being, unless the act is justified or legally excused, and the intent excused, and the intent to do the act is criminal and imparts to said act the character of an offense, and one who violates the law, which he is conclusively presumed to know, cannot be heard to say that he had no criminal intent in doing the forbidden act.
>
> *Every man is presumed to intend the natural consequences of his acts, and when one does an illegal act, he is responsible for all the consequences that legitimately flow therefrom.* [Emphasis added.]

B. *Subsequent court proceedings*

On direct appeal to the Indiana Supreme Court, petitioner raised all the foregoing trial events in terms of the pertinent federal constitutional and statutory provisions. All such claims were rejected, and the conviction was affirmed. *Jacks* v. *State*, ... Ind. ....., 394 N.E.2d 166 (1979); App. C, pp. 59-77, *infra*. The petitioner thus fully exhausted his state court remedies. The State makes no contention to the contrary.

Thereafter, petitioner instituted this habeas corpus proceeding in the federal courts, invoking 28 U.S.C. §2254. The same federal constitutional and statutory issues were raised. On April 11, 1980, the federal district court, after

"a careful review of the state court record in this criminal case as mandated by *Townsend* v. *Sain*, 372 U.S. 293 (1963)," found no merit in petitioner's contentions and denied his habeas corpus application. 486 F.Supp. 1366; App. B, p. 44, *infra*. In the course of denying the application, the court also denied petitioner's motion for an evidentiary hearing and oral argument. But the court did grant a certificate of probable cause, thereby allowing an appeal to the Seventh Circuit.

On June 10, 1981, the Seventh Circuit affirmed the District Court's order by a 2-1 vote, Circuit Judge Swygert dissenting. 561 F.2d 480; App. A, pp. 1-30, *infra*. The majority opinion stated that, review in a habeas corpus proceeding being "limited to constitutional errors that deprive a defendant of fundamental fairness guaranteed by the Fourteenth Amendment," the court could find no such error in petitioner's state court trial. Judge Swygert, on the other hand, found two "egregious" errors by the state trial court that, in his judgment, necessitated the grant of habeas corpus.

More specifically, the majority opinion of the Seventh Circuit ruled:

(1) Conceding that "it might have been better practice to suppress the sentence," the majority held the trial court's admission of petitioner's request for a lawyer—in his recorded conversation with Sergeant Miller—was "not so prejudicial a ruling as to constitute reversible error in view of the strong case against petitioner." App. A, p. 5, *infra*. The court said the admission of this request for an attorney did not implicate petitioner's privilege against self-incrimination or his constitutional right to counsel.

(2) As to the introduction and playing of the illegally taped phone conversation of August 28, the majority held

that its use for impeachment purposes did not violate Section 2515 of Title III of the Omnibus Crime Control Act. To the extent the jury was permitted to use the conversation on the issue of petitioner's sanity, the court found the conversation of sufficient probative value to be admissible despite the illegality of the recording. And, "even assuming, however, there was error," the court concluded that a violation of Section 2515 is not such a non-constitutional violation as to be cognizable in a Section 2254 habeas corpus proceeding. The court relied upon its own earlier decision in *Hussong* v. *Warden,* 623 F.2d 1185 (C.A. 7, 1980), in making the latter ruling.

(3) The court found that State's Instruction No. 5, to the effect "that every one is presumed to intend the natural and probable consequences of his voluntary acts," did not have the conclusive or burden-shifting effect an identical instruction was held to have in *Sandstrom* v. *Montana,* 442 U.S. 510 (1979). The distinguishing feature of the instruction in this case was said to be the addition of the qualifying phrase, "unless the circumstances are such as to indicate the absence of such intent," as well as other language in the instruction allowing the jury to look to surrounding circumstances and "the absence of justifying or excusing facts."

Dissenting from rulings (1) and (3), although agreeing with ruling (2), Circuit Judge Swygert would have granted the writ of habeas corpus. On August 14, 1981, the Seventh Circuit denied rehearing, as well as a suggestion for rehearing in banc. App. p. 58, *infra.*

REASONS FOR GRANTING THE WRIT

There are three important questions arising in this habeas corpus proceeding that warrant the grant of certiorari. In differing ways, each question reflects a serious fault in the administration of the criminal justice system of the several States. These faults, being of federal constitutional and statutory dimensions, can be and should be reviewed and corrected by this Court.

1. The decision below seriously erodes the Sandstrom doctrine invalidating any shift of the State's burden to prove all essential elements of the crime charged.

Circuit Judge Swygert has termed the approval by the Seventh Circuit of the use of State's Instruction No. 5 "a dangerous precedent that shatters the foundation of our criminal justice system: that every person is presumed innocent unless proven otherwise beyond a reasonable doubt." App. A, pp. 22-23, *infra*. That is not an overstatement, and that is why certiorari should be granted on this issue.

In *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), this Court outlawed, under the Due Process Clause of the Fourteenth Amendment, the use of a jury instruction virtually identical to the one used in this, the *Jacks* case:

Sandstrom instruction	*Jacks instruction*
[T]he law presumes that a person intends the ordinary consequences of his voluntary acts. (442 U.S. at 512).	[E]very one is presumed to intend the natural and probable consequences of his voluntary acts, . . . (App. A, p. 22, *infra*).

This Court held the *Sandstrom* instruction invalid because the jury might have interpreted it in one of two ways, either of which is impermissible: (1) as a "conclusive" presumption, an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption; or (2) as a direction to find intent upon proof of the defendant's voluntary acts and their "ordinary" consequences, unless the defendant proved the contrary by some unknown quantum of proof—"thus effectively shifting the burden of persuasion on the element of intent." 442 U.S. at 517. The instruction in the instant *Jacks* case gave the jury precisely the same two impermissible options.

The Seventh Circuit has held that the dual invalidity built into an instruction of this nature somehow disappears if the instruction adds certain mitigating language not present in the *Sandstrom* instruction. The notion is that, having given an infirm *Sandstrom* direction, the instruction should quickly add a qualifying phrase or two, such as: "unless the circumstances are such as to indicate the absence of such intent."

Just how that qualification is certain to dissipate the damage just done in the *Sandstrom* portion of the instruction is not explained by the Seventh Circuit. How can we be assured that the jury will ignore the *Sandstrom* portion and view all "the circumstances" as if that portion had never been given? How can we be assured that the jury will not follow the *Sandstrom* direction and shift the burden to the defendant of proving his insanity beyond a reasonable doubt? Does not the *Sandstrom* opinion of this Court warn that "even if a jury *could* have ignored the presumption [implicit in the instruction] and found defendant guilty because he acted knowingly, we cannot be certain that this is what they *did* do"? 442 U.S. at 526 (emphasis in original).

As Circuit Judge Swygert has said, the decision below creates a dangerous precedent. It sanctions the use of the instruction outlawed by *Sandstrom*, provided only that some dubious mitigating language is added. State courts can be expected to watch the outcome of this case to see if they can start reusing the constitutionally invalid instruction with the magical addition sanctioned by the court below. This Court should grant certiorari to see if the approval of the qualifying language impugns the integrity of the *Sandstrom* doctrine and opens the door to shifting the burden of proof respecting essential elements of crimes from the State to the defendant.

The Seventh Circuit concluded its discussion of this instruction by remarking that "because the evidence of petitioner's guilt was overwhelming, any error in giving Instruction No. 5 should be treated as harmless." This Court's *Sandstrom* opinion stands as a total repudiation of that remark. The Court there held, consistent with a long line of precedent, "that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." 442 U.S. at 526. And, most pertinently, the Court added that "in any event an unconstitutional jury instruction on an element of the crime can never constitute harmless error." *Ibid.* The Seventh Circuit's holding to the contrary should not go unreviewed and unchallenged.

2. The decision below approving the admission into evidence of petitioner's request "to talk to my attorney" conflicts with this Court's precedents.

The majority below held there was no reversible error in admitting into evidence petitioner's statement to the police, after his arrest and receipt of the *Miranda* warnings, that "[a]s regards what happened this evening, I

want to talk to my attorney." Approving the admission of those 13 words conflicts with, and indefensibly limits, this Court's decisions in *Doyle* v. *Ohio*, 426 U.S. 610 (1976), and *United States* v. *Hale*, 422 U.S. 171 (1975).

In *Doyle*, this Court held that "the use for impeachment purposes of petitioner's silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." 426 U.S. at 619. In *Hale*, where the prosecutor cross-examined the defendant about his silence during police interrogation, the Court held that such silence "lacked probative value and that any reference to his silence under such circumstances carried with it an intolerably prejudicial impact." 422 U.S. at 180. See also *Grunewald* v. *United States*, 353 U.S. 391, 422-3 (1957).

The majority below rejected the applicability of the *Doyle* and *Hale* precedents by asserting that "this case does not involve an attempt by the prosecutor to use petitioner's silence . . . against him or for impeachment purposes." App. A, p. 4, *infra*. But for what purpose did the prosecutor insist that the portion of the tape ending with the request for counsel be played to the jury? Why did the prosecutor in his closing argument read to the jury this portion of the tape? See R. 613. Was he using the taped request for counsel as a device for commenting on or "using" petitioner's silence which appeared to follow the request? As Circuit Judge Swygert said in his dissent below, App. A, pp. 27-28, *infra*, if the prosecutor was not really attempting to use Jacks' silence against him.

> . . . then there would not have been any reason to have played the recording for the jury. During the conversation, Jacks never told the police anything except basic information such as his name, age, address, and occupation. Any reading of the transcript in Appen-

> dix A [to the majority opinion] would show that the only reason to introduce the tape into evidence was to inform the jury that Jacks had said he would not talk to the police until he had spoken to his lawyer. None of the rest of the conversation was at all useful to the jury.

Thus the only statement of any conceivable interest to the prosecutor or the jury was the request to consult counsel. And repeated emphasis of that request to the jury can only constitute an impermissible exploitation of petitioner's right to remain silent. Certainly, as Judge Swygert noted, "[t]he mere fact that he had answered a few innocuous questions before he made that statement should not render his request for counsel admissible; nor should such trivial responses amount to a waiver of his constitutional right to remain silent." App. A, p. 28, *infra*.

While admitting that "it might have been better practice to suppress the evidence," the majority below sought to trivialize the incident. It did so by noting that petitioner testified freely at trial and by speculating that "the reading of this one sentence to the jurors after they had been read the considerable forepart of petitioner's conversation with Officer Miller would be lost in all the rest of the evidence rather than to cause them to convict." App. A, p. 5, *infra*. But the fact that Jacks testified freely at trial is totally irrelevant to his request for counsel at the time of his arrest. To quote again from Judge Swygert's dissent, "*Miranda* rights are too sacred and too fundamental as protection of the guarantee of a fair trial to rest upon so unstable a foundation." App. A, p. 29, *infra*. And see *Edwards* v. *Arizona*, 68 L.Ed.2d 378, 101 S.Ct. 1880, 1885 (May 18, 1981).

Reduced to its barebones, the decision below means that a prosecutor can comment freely to the jury about a de-

fendant's invocation of his right to remain silent, as reflected in his request for counsel, provided only that (a) the recorded request is preceded by innocuous questions and answers, (b) the defendant testifies at trial, and (c) the recorded request is likely to become lost in the welter of other evidence of guilt. That cannot be. That is a dangerous precedent. It is inconsistent with the holdings and rationale of *Doyle* and *Hale*. And it is even more directly controverted by the Fifth Circuit's holding in *Baker* v. *United States*, 357 F.2d 11, 13-14 (C.A. 5, 1966), "that it was reversible error to have allowed the F.B.I. Agent to testify that when appellant was first questioned, he indicated that he wanted a lawyer and thereafter made no further statement . . . [this] was as objectionable as it would have been to comment on a defendant exercising his Constitutional right not to take the witness stand."

The "intolerably prejudicial impact," *United States* v. *Hale, supra*, 180, of such exploitation of the right to remain silent during police interrogation is particularly strong in a case involving an insanity defense. And where, as here, the evidence on this crucial issue of sanity is closely divided, the jury's assessment of the credibility of the defendant's own testimony about his sanity may easily be prejudiced unduly by the prosecutor's repeated use of the defendant's request for counsel. It is difficult to accept the statement in the opinion below, App. A, p. 4, n. 1, *infra*, that because there was "strong evidence of defendant's guilt"—which is something quite different from evidence of a defendant's sanity—the error in admitting the request for counsel "was harmless error."

3. The decision below raises uniquely important problems as to (a) the admissibility in a state criminal proceeding of evidence obtained in violation of the federal wiretap statute, and (b) the cognizability of such a violation of federal law in a §2254 habeas corpus proceeding.

There are three facets to Part II of the majority opinion below, all dealing with the illegally taped phone conversation between petitioner and his mother on the night of his arrest. Each facet gives rise to important problems never before addressed by this Court.

These problems stem from the interplay of two federal statutes. One is Section 2515 of Title III of the Omnibus Crime Control Act of 1968, 18 U.S.C. §2515. That is an unusual federal statute that states in no uncertain terms that evidence derived from a wiretap in violation of the statutory requirements "may [not] be received in evidence in any [state court] trial." In this case, the State concededly intercepted the mother-son phone conversation of August 28 in violation of the Title III wiretap requirements.[1] The other federal statute involved is 28 U.S.C. §2254(a), which authorizes federal courts to issue habeas corpus writs where state prisoners are in custody "in violation of the Constitution *or laws* or treaties of the United States." (Emphasis added.)

(1) In the initial paragraph of Part II of the opinion below, the Seventh Circuit holds that, to the extent that

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[1] The State has conceded there was no court order or warrant authorizing the wiretap. Section 2518(3) of Title III, 18 U.S.C. §2518(3), requires court authorization to intercept any wire or oral communication. Section 2515 in turn forbids the receipt in evidence, in any state or federal court, of the contents of any communication intercepted in violation of Title III.

the illegally taped phone conversation was introduced and used for impeachment purposes, such use constitutes an implied exception to the strictures of Section 2515. The only authority cited is a Fifth Circuit case, *United States* v. *Caron*, 474 F.2d 506, 509-510 (C.A. 5, 1973); that decision pointed to a sentence in a Senate report preceding the adoption of Title III (S. Rep. No. 1097, 90th Cong., 2d Sess., 1968) indicating that Section 2515 was not designed to press the suppression rule "beyond present search and seizure law," citing *Walder* v. *United States*, 347 U.S. 62 (1954).[2] From which the Seventh Circuit concludes that, by extending to Title III the judicially created doctrine allowing use for impeachment purposes of evidence obtained in violation of the Fourth Amendment, the evidence here obtained in violation of Title III can be introduced and used to impeach defense witnesses.

Two problems are immediately evident. Since the plain language of Section 2515 of Title III makes no *Walder-Harris* type exception, it seems dubious that one can be read into Title III by resort to one sentence in a committee report. Moreover, this Court has twice indicated that the availability of the suppression remedy for violations of Section 2515 "turns on the provisions of Title III rather than the judicially fashioned exclusionary rule" developed under the Fourth Amendment. *United States* v. *Donovan*, 429 U.S. 413, 432 n.22 (1977); *United States* v. *Giordano*, 416 U.S. 505, 524 (1974). The Seventh Circuit's ruling on this matter clearly deserves and needs this Court's consideration.

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[2] This Court has applied the rationale of the *Walder* case, which involved evidence seized in violation of the Fourth Amendment, to permit the use for impeachment purposes of evidence taken in violation of *Miranda*. *Harris* v. *New York*, 401 U.S. 222 (1971).

(2) The second paragraph of Part II of the opinion below deals with the use of the illegally taped conversation on the issue of petitioner's sanity. The court holds the tape admissible for that purpose since it was "of probative effect." Is this to be a new judicially-created exception to the plain wording of Section 2515? That section says that no illegally taped evidence "may be received in evidence." By what principle of statutory construction can a court read that provision to say that illegally taped evidence that is found to be "of probative effect" may indeed "be received in evidence"?

(3) The third and last paragraph of Part II of the opinion below embodies the ultimate holding of the Seventh Circuit respecting use of the illegally taped conversation. Even if there was error in admitting the tape, says the court, our own precedent in *Hussong* v. *Warden*, 623 F.2d 1185 (C.A. 7, 1980), compels us to hold that a conceded violation of Section 2515 of Title III is "not cognizable in a habeas corpus proceeding under 28 U.S.C. §2254." App. A, p. 8, *infra*. At least that is so, adds the court, "where as here the defendant had received a sufficient hearing in state court on his suppression claims, so that his custody was not inconsistent with the rudimentary demands of fair procedure and did not constitute a complete miscarriage of justice." *Ibid.*

Reference to the *Hussong* case reveals that this conclusion represents a curious blend of principles and precedents having nothing whatever to do with the availability of habeas corpus relief under Section 2254 for conceded violations of Section 2515 of Title III. *Hussong* mainly relies on two decisions of this Court not here relevant. In *Hill* v. *United States*, 368 U.S. 424, 428-9 (1962), and *United States* v. *Timmreck*, 441 U.S. 780, 784-5 (1979), this Court carefully limited itself to deciding that a federal

prisoner cannot obtain habeas corpus relief under Section 2255 "when all that is shown is a failure to comply with the formal requirements of the Rule," *i.e.*, a particular Rule of the Federal Rules of Criminal Procedure.

Hussong also attempts to read the *Hill* and *Timmreck* decisions as establishing the general proposition that habeas corpus relief is never available for nonconstitutional violations of federal law unless those violations result in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair procedure." See *Timmreck*, 441 U.S. at 784; *Hill*, 368 U.S. at 428. But that may be too broad a reading of those two decisions. The Court held in those cases only that the particular violations of the Criminal Rules did not in the circumstances result in a complete miscarriage of justice or in an unfair proceeding. As was said in *Hill*, 368 U.S. at 429, whether habeas corpus relief would be available if a violation of a Criminal Rule "occurred in the context of other aggravating circumstances is a question we therefore do not consider."

The point is that this Court has yet to rule that a nonconstitutional violation of a federal statute can never be cognizable in a habeas corpus proceeding. Much would appear to depend upon the context of the violation, the nature of the statutory requirement that has been violated, and the degree of prejudice to the defendant resulting from the violation. Certainly a violation of a federal statute like Section 2515 must be viewed as something more serious and more inconsistent with the rudimentary demands of fair procedure than a violation of some formal requirement of a criminal rule of procedure.

Section 2515 embodies a strong and unique federal policy of protecting the right of privacy, even when that right is

invaded in the course of state criminal proceedings. Within the context of Section 2515 and Title III, any court proceeding that permits the introduction and use of evidence intercepted in violation of Title III would appear to involve what Congress deemed in this statute to be a miscarriage of justice or an unfair procedure. And if we are to respect the teaching of this Court in *Donovan* and *Giordano*, it appears impermissible to assess the seriousness of a Title III violation in terms of the "judicially fashioned exclusionary rule" developed under the Fourth Amendment. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. 465 (1976).

In sum, why should not a §2254 habeas corpus proceeding be deemed an appropriate vehicle for vindicating the extraordinarily strong federal policy embodied in Section 2515 of Title III? The Seventh Circuit has provided no satisfactory answer to that question. Only this Court can do so.

CONCLUSION

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JULIUS LUCIUS ECHELES
35 East Wacker Drive
Chicago, Illinois 60601

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, N. C. 27514
Counsel for Petitioner

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-1639

EDWARD DENNIS JACKS, JR.,

Petitioner-Appellant,

v.

JACK R. DUCKWORTH, Warden,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. S79-308—Allen Sharp, *Judge.*

Argued December 10, 1980—Decided June 10, 1981

Before SWYGERT and CUMMINGS, *Circuit Judges,* and BROWN, *Senior District Judge.**

CUMMINGS, *Circuit Judge.* Petitioner Edward Dennis Jacks, Jr. appeals from a denial of his habeas corpus petition under 28 U.S.C. § 2254. Petitioner was indicted by an Indiana grand jury in September 1975 for the first-degree murder of his wife, Kathleen B. Jacks, on August

* The Honorable Wesley E. Brown, Senior District Judge of the District of Kansas, is sitting by designation.

28, 1975. The case was tried by a jury in Indiana state court in November 1976. At trial, petitioner contended that he was not criminally responsible by reason of insanity at the time of the homicide. The jury found petitioner guilty as charged, and he was sentenced to life imprisonment. The Indiana Supreme Court affirmed the conviction on direct appeal. *Jacks* v. *State*, ... Ind. ....., 394 N.E.2d 166 (1979). Petitioner then filed the present habeas corpus petition, raising essentially the same issues decided adversely to him in the direct appeal. The district court agreed with the conclusions of the Indiana Supreme Court and dismissed the petition. Our review in a habeas corpus proceeding is limited to constitutional errors that deprive a defendant of fundamental fairness guaranteed by the Fourteenth Amendment. *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 642-643; see *Stone* v. *Powell*, 428 U.S. 465. Finding no such error in petitioner's trial, we affirm.

I

Petitioner's first asserted ground for relief concerns a portion of a tape-recorded conversation between himself and Detective Sergeant Miller which took place at the police station after petitioner's arrest on August 28, 1975. At the outset of the conversation, Sergeant Miller gave petitioner his *Miranda* warnings. Petitioner did not then invoke either his right to remain silent or his right to have an attorney present, but continued to converse with Sergeant Miller and to answer preliminary questions about his name, age, and occupation. Thereafter the following colloquy took place:

> Mr. Miller: Do you know what happened? Tonight?
>
> [Petitioner]: I'm not exactly sure what happened.

Mr. Miller: You're not exactly sure. Have you been drinking?

[Petitioner]: As regards what happened this evening, I want to talk to my attorney.

Mr. Miller: Okay.

Thereafter petitioner continued to engage in an extended conversation with Sergeant Miller. The trial court admitted into evidence that portion of the conversation, offerred for supposed admissions and denials therein, ending with the above-quoted colloquy and excluded everything thereafter.

Petitioner claims that his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to counsel, as incorporated in the Fourteenth Amendment, were violated when the jury was permitted to hear over his objection the single statement to Sergeant Miller that "As regards what happened this evening, I want to talk to my attorney." The prior conversation with Miller is not challenged. (It is reproduced in Appendix A hereto.) To support this argument, petitioner relies principally on *Doyle* v. *Ohio*, 426 U.S. 610, in which the Supreme Court held "that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings violated the Due Process Clause of the Fourteenth Amendment." 426 U.S. at 619. Petitioner also relies on *United States* v. *Hale*, 422 U.S. 171, in which the prosecutor was not permitted "during the trial to call attention to * * * [petitioner's] silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do so, an unfavorable inference might be drawn as to the truth of his trial testimony * * *." 422 U.S. at 182-183.

However, neither *Doyle* nor *Hale* is applicable here because this case does not involve an attempt by the prosecutor to use petitioner's silence or failure to testify against him or for impeachment purposes. In fact, petitioner did not remain silent at the time of arrest. Rather, he spoke voluntarily and freely with Sergeant Miller after having received his *Miranda* warnings and even after having uttered the 13 words now in issue, thereby indicating that he was not then invoking his right to remain silent.[1] Out of an abundance of caution and in foreordained harmony with *Edwards* v. *Arizona*, ... U.S. ....., 49 LW 4496, decided by the Supreme Court on May 18, 1981, the trial judge granted petitioner's motion to suppress the portion of the tape immediately following the challenged sentence (R. 554-555). (The suppressed statement is reproduced in Appendix B hereto.) But it is only at the very end of the tape, some three pages of transcript after that sentence, that petitioner stated he "desired to have an attorney be-

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[1] Other cases on which petitioner relies are similarly distinguishable in that they involved situations in which the defendant exercised his constitutional rights and remained silent. For example, in *United States* v. *Matos*, 444 F. 2d 1071 (7th Cir. 1971), the defendant did not make any pretrial statement after indicating that he did not wish to do so and a postal inspector told the jury that defendant had refused to make a pretrial statement. See also *United States* v. *Nielsen*, 392 F.2d 849 (7th Cir. 1968); *Baker* v. *United States*, 357 F.2d 11 (5th Cir. 1966). We also note that in his *Matos* dissent then Judge Stevens concluded that because of the strong evidence of defendant's guilt, the postal inspector's comment was harmless error. 444 F.2d at 1077. The same would be true here if indeed there were error at all.

In *Edwards* v. *Arizona*, *infra*, the state courts admitted in evidence statements implicating defendant in the crime after he had requested the presence of counsel. Here the trial judge suppressed all statements of Jacks after he first requested counsel.

fore talking [further] to the police" (R. 352) and stopped talking. Petitioner himself explained to Sergeant Miller after the challenged sentence that he did not want to call an attorney (R. 351), and Richard H. Sproull, then co-counsel for petitioner, subsequently admitted to the judge that at the time in question petitioner did not want a lawyer (R. 558). Petitioner also testified freely at his trial. Certainly the reading of this one sentence to the jurors after they had been read the considerable forepart of petitioner's conversation with Officer Miller would be lost in all the rest of the evidence rather than cause them to convict. The trial judge left it in merely to mark the termination of the permissible evidence and that which became impermissible, he thought, after defendant first sought counsel. While it might have been better practice to suppress the sentence, certainly it was not so prejudicial a ruling as to constitute reversible error in view of the strong case against petitioner.

Consequently, it is obvious that appellate counsel for petitioner is now presenting a self-serving, unwarranted interpretation of a single sentence whose admission in nowise was a violation of petitioner's constitutional rights in that petitioner was not at that point invoking either his right to remain silent or his right to have counsel present. Indeed his right to counsel under the Sixth and Fourteenth Amendments had not attached because no adversary judicial proceedings had been initiated. *Moore* v. *Illinois*, 434 U.S. 220, 226-227. The district court therefore correctly held that reversible error was not committed when this sentence was permitted into evidence without any misuse by the prosecutor.

II

Petitioner next claims that the trial court committed reversible error by allowing the jury to hear a tape recording of a telephone conversation between petitioner and his mother that also took place on the night of his arrest. The conversation was recorded without a court order and therefore, as the State concedes, could not be used by the State as part of its case in chief. However, the State maintains that the tape was admissible in its rebuttal under *Harris* v. *New York*, 401 U.S. 222. In *Harris*, the Supreme Court held that otherwise impermissible evidence could be used by the prosecution on rebuttal, stating that no exclusionary rule may permit affirmative perjury and that "sufficient deterrence [to proscribed police conduct] flows when the evidence in question is made unavailable to the prosecution in its case in chief." 401 U.S. at 225. While *Harris* and its progeny[2] involved evidence obtained in violation of the Fourth Amendment, the rationale has been extended, and properly so, to cases involving evidence obtained as here in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-2520). See *United States* v. *Caron*, 474 F.2d 506, 509-510 (5th Cir. 1973).

In sustaining the admissibility of the tape and denying petitioner's motion for a mistrial, the trial judge noted that it dealt with petitioner's and his mother's testimony on direct examination. He admonished the jury that the contents of the tape should be considered only to determine the credibility of petitioner and his mother and on the

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[2] *E.g.*, *United States* v. *Havens*, 100 S.Ct. 1912; *Oregon* v. *Hass*, 420 U.S. 714; see also, *Walder* v. *United States*, 347 U.S. 62, 65; *United States* v. *Farese*, 611 F.2d 67 (5th Cir. 1980); *United States* v. *Tweed*, 503 F.2d 1127 (7th Cir. 1974).

issue of petitioner's sanity,[3] but not as to whether petitioner had committed the crime charged. In so doing, the judge could properly have relied on *United States* v. *Stewart*, 443 F.2d 1129 (10th Cir. 1971).[4] In that case, as here, the sole defense was insanity. In its rebuttal, the Government was permitted to introduce a tape of an undercover police agent's two conversations with the defendant even though the conversations were illegally recorded. The jury was instructed that the evidence was to be considered on the issue of the defendant's competence on the date of the alleged narcotics transactions and on the question of defendant's specific intent. On appeal, the Tenth Circuit

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[3] The State interprets the court's instructions to the jury as permitting the jurors to consider the tape with respect to the credibility of petitioner and his mother as to their testimony on his mental condition and not independently on the issue of his sanity. This interpretation harmonizes with a previous instruction given the jury with respect to petitioner's mother's earlier testimony about her telephone conversation with petitioner (R. 658). Nevertheless, the court's earlier reliance on *United States* v. *Stewart*, 443 F.2d 1129 (10th Cir. 1971), as discussed in the text, persuades us that the instruction was not as narrow as the State would like.

[4] The trial judge inadvertently referred to the *Stewart* case as *United States ex rel. Henderson* v. *Mazurkiewicz* (R. 360) apparently because that was the heading in F.2d above the language he relied upon in the *Stewart* opinion.

The judge had cited *Stewart* in a colloquy with counsel as to the admissibility of the first portion of the taped conversation between Sergeant Miller and petitioner (R. 360). However, that tape was offered by the Government in its case in chief to show admissions of petitioner and not as to his sanity defense (R. 358). The judge *sua sponte* instructed the jury to consider the intercepted telephone conversation between petitioner and his mother as to petitioner's sanity as well as to their credibility (compare R. 658 with R. 848). In so doing he may well have had in mind his earlier reliance on *Stewart* to which he had called counsel's attention.

upheld the use of the tape, stating that the conversations were "of probative effect and of particular relevance to the question of Stewart's mental capacity." 443 F.2d at 1135. Likewise, in this case, petitioner's conversation with his mother is "of probative effect" with respect to petitioner's mental condition and with respect to the trial testimony of petitioner and his mother as to his sanity. Therefore, the trial court's ruling is supported by *Stewart* and was not erroneous. In addition, there was no objection to the court's letting the jury consider it as to petitioner's sanity.

Even assuming, however, that there was error, we would be compelled to affirm on the basis of *Hussong* v. *Warden, Wisconsin State Reformatory,* 623 F.2d 1185 (7th Cir. 1980). In *Hussong,* incriminating evidence obtained in violation of Title III was used against defendant in the prosecution's case in chief at defendant's trial for murder. We held that such a non-constitutional violation was not cognizable in a habeas corpus proceeding under 28 U.S.C. § 2254 where as here the defendant had received a sufficient hearing in state court on his suppression claims, so that his custody was not inconsistent with the rudimentary demands of fair procedure and did not constitute a complete miscarriage of justice. Here as there, to paraphrase Judge Swygert's language in *Hussong,* "we have no reason to believe that [petitioner] was not convicted on the basis of probative and reliable evidence, even if that evidence was wrongfully admitted. In short there is nothing in the record to indicate that [petitioner] is not guilty of the crime for which he was convicted." 623 F.2d at 1191. Accordingly, we reject petitioner's assertion that the receipt into evidence of the conversation between him and his mother justifies collateral relief from his conviction.

III

Petitioner also complains of three instructions to the jury that are reproduced in Appendix C hereto.

Under Indiana law, petitioner waived the right to object to Court's Instruction No. 13 because of his failure to make a timely objection. See *Bell* v. *State*, 267 Ind. 1, 366 N.E.2d 1156, 1160 (1977). Since petitioner has not shown cause for his failure to make a timely objection and actual prejudice by the use of Instruction No. 13, habeas corpus relief is improper. *Wainwright* v. *Sykes*, 433 U.S. 72; *Blenski* v. *LaFollette*, 581 F.2d 126, 129-130 (7th Cir. 1978). Furthermore, any defect in Instruction No. 13 was cured by Court's Instruction No. 5, *infra*, p. 11.

Petitioner did object to the giving of the State's Instructions Nos. 4 and 5 and contends that those instructions diluted the State's burden of proof on intent by permitting the jury to presume intent against him.

As to State's Instruction No. 4, there was no error. It was derived from language in *Hill* v. *State*, 252 Ind. 601, 251 N.E.2d 429, 435-436 (Ind. 1969), and does not have the claimed effect of allowing the jury to presume the intent requirement of the offense against petitioner. Nor was it, as petitioner claims, fatally "prejudicial in the context of jury instructions concerning social responsibility and philosophy" (Br. 38). Furthermore, as noted by the Supreme Court of Indiana (394 N.E.2d at 174), the defense of insanity alluded to in that instruction of course had to be read with Court Instruction No. 22 concerning the sanity issue (R. 240). Petitioner does not attack comprehensive Instruction No. 22. Since jury instructions must be viewed as a whole (*Cupp* v. *Naughten*, 414 U.S. 141), there was no reversible error in giving Instruction No. 4.

Similarly, in contrast to the instruction condemned three years after this trial in *Sandstrom* v. *Montana*, 442 U.S. 510, on which petitioner relies, Instruction No. 5 does not contain a mandatory injunction to presume the requisite intent from the act committed since the jurors were told they could "look to all the surrounding circumstances, including what was said and done in relation thereto" and that any presumption of "a criminal intent from an unlawful act knowingly done" was rebuttable by "justifying or excusing facts." The absence of a mandatory effect in State's Instruction No. 5 is also shown by the qualifying phrase "unless the circumstances are such as to indicate the absence of * * * intent" which follows the reference to the presumption condemned in *Sandstrom* that everyone intends the natural and probable consequences of his voluntary acts.[5] Since the qualifying phrases nullified the mandatory flavor of the language condemned in *Sandstrom*, Instruction No. 5 did not dilute the State's burden of proof and the district court correctly held that there was no error committed in giving this instruction. Judge Sharp properly rested his conclusion on the following language from the Indiana Supreme Court herein:

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[5] In *McGuinn* v. *Crist*, 492 F.Supp. 478, 481 (D. Mont. 1980), which petitioner cites to us, the instruction was word for word the one condemned in *Sandstrom*, *supra*, so that the case was controlled thereby. Moreover, in *McGuinn* the prejudicial effect of its *Sandstrom* instruction was aggravated by another immediately following instruction. Therefore, *McGuinn* does not support petitioner.

As with the Third and Fifth Circuits, we agree that this type of instruction should not be given in future cases. *United States* v. *Garrett*, 574 F.2d 778 (3d Cir. 1978); *United States* v. *Chiantese*, 560 F.2d 1244 (5th Cir. 1977).

In *United States* v. *Spiegel*, 604 F.2d 961, 969 (5th Cir. 1979), the court stated that *Sandstrom* should not be given retroactive effect.

"Further, however, it would appear the instruction given in this case does not have either the conclusive or burden-shifting effect the Court found repugnant in the *Sandstrom* case. 'Sandstrom's jurors were told that the law presumes that a person intends the ordinary consequences of his voluntary acts.' They were not told they had a choice, or that they might infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory. ..... U.S. ....., 99 S.Ct. at 2454. In the present case the trial court did make the statement found in *Sandstrom*. However, the court qualified it by stating that the jurors were to look to all of the surrounding circumstances, including what was said and done in relation to the acts, and that everyone is presumed to intend the natural consequences of his voluntary acts *unless* the circumstances are such as to indicate the absence of such intent. The second paragraph of State's instruction number five says that '[w]hen an unlawful act, however, is proved to be knowingly done, no further proof is needed on the part of the State *in the absence of justifying or excusing facts*. . . . Record at 274 (emphasis added). Therefore, we do not feel that this instruction was as limited and mandatory in effect as the United States Supreme Court found the instruction in *Sandstrom* to be. We find no error as to this issue." 394 N.E.2d at 175.

As in *United States* v. *Tecumseh*, 630 F.2d 749, 754 (10th Cir. 1980), certiorari denied, 101 S.Ct. 376, if the entire instructions given in a case make plain that "the burden of proving every essential element of the crime charged • • • was upon the prosecution," there is no violation of the Due Process Clause. See also *United States* ex. rel. *Goddard* v. *Vaughn*, 614 F.2d 929, 935 (3d Cir. 1980). Here too the instructions as a whole make it plain that the jury was not compelled to presume intent. Thus the trial court read 34 instructions to the jury. In reading the indictment

in Court Instruction No. 1 as to first degree murder, of which Jacks was ultimately convicted, the court noted that the grand jury indicted petitioner for "unlawfully, feloniously, *purposely* and maliciously, and with premeditated malice" murdering his wife. He told the jurors in his Instruction No. 2 that the burden was upon the State "to prove all of the material allegations of the indictment, beyond a reasonable doubt."

In his Instruction No. 3, he read the Indiana statute defining murder in the first degree as applying to "Whoever purposely and with premeditated malice . . . kills any human being." Then the court read its Instruction No. 4 that "a Defendant is presumed to be innocent until the contrary is proved. When there is a reasonable doubt whether his guilt is satisfactorily shown, he must be acquitted."

In the Court's Instruction No. 5, jurors were told that in order to find petitioner guilty of murder in the first degree, the State must establish by proof "beyond a reasonable doubt that the crime charged against the Defendant was committed by him purposely and with premeditated malice" and that "purposely" means intentionally and designedly. The Court's Instruction No. 12 advised the jury that the use of a deadly weapon does not necessarily imply the requisite malice "unless such deadly weapon was intentionally used in such a manner as was calculated to or was likely to cause death * * *."

Again, in Court's Instruction No. 14, the jury was advised that the jurors must "endeavor to reconcile all the evidence in the light of the presumption of innocence, if it is possible so to do," and that the presumption of innocence alone "is sufficient to acquit a Defendant, unless you are satisfied beyond a reasonable doubt of the Defendant's guilt from all the evidence in the case."

In Court's Instruction No. 15, the jurors were reminded that the burden of proof was upon the State "to prove the Defendant guilty beyond a reasonable doubt" and that "the evidence in the case must produce in your own mind such a firm belief of guilt that you would be freely willing to act upon that belief in any matter of the highest concern and importance to your own dearest interest." They were also told that because of defendant's plea of not guilty by virtue of unsound mind, the burden was upon the State "to prove beyond a reasonable doubt that the Defendant was sane at the time the crime charged was committed" (Court's Instruction No. 18).

The Court's Instruction No. 20 further protected this petitioner because the jury was instructed that a person must be found not guilty even if "he had the mental capacity to appreciate the wrongfulness of his conduct" if at that time his mind was "so affected as a result of mental disease or defect that he lacked substantial capacity to conform his conduct to the requirements of law."

The Court's Instruction No. 29 admonished the jurors that they must consider the instructions as a whole. In view of these careful instructions, petitioner cannot persuasively contend that State's Instruction No. 5 forced them to find that petitioner had the requisite intent beyond a reasonable doubt. Therefore we conclude that this instruction did not so infect the entire trial as to violate due process and invalidate the state court judgment. *Henderson* v. *Kibbe,* 431 U.S. 145, 146. Finally, because the evidence of petitioner's guilt was overwhelming, any error in giving Instruction No. 5 should be treated as harmless. *Holloway* v. *McElroy,* 632 F.2d 605, 618 (5th Cir. 1980); *United States* v. *Bohlmann,* 625 F.2d 751, 753 (6th Cir. 1980).

IV

Petitioner's final claim is that there is insufficient evidence to prove beyond a reasonable doubt that he was legally sane and capable of the requisite intent for first degree murder at the time of the homicide, and that his conviction therefore violates the Due Process Clause of the Fourteenth Amendment. Petitioner is not entitled to habeas corpus relief upon this theory unless "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 324. As *Jackson* teaches, we must in deciding this issue view the evidence in the state court record in the light most favorable to the prosecution. 443 U.S. at 324. We conclude that the record so viewed demonstrates that rational triers of fact could have found petitioner sane beyond a reasonable doubt at the time of the offense.

Since the petitioner denied his guilt by reason of insanity, the State had the burden of proving defendant's sanity at the time of the fatal shooting of his wife. *Riggs* v. *State*, 264 Ind. 263, 342 N.E.2d 838 (1976). Indiana law on the issue of sanity is controlling. *Moore* v. *Duckworth*, 581 F.2d 639, 641 (7th Cir. 1978), affirmed, 443 U.S. 713; *Brooks* v. *Rose*, 520 F.2d 775 (6th Cir. 1975). Indiana jurors are permitted to credit the testimony of lay witnesses as well as expert witnesses as to a defendant's insanity. *Murphy* v. *State*, 265 Ind. 116, 369 N.E.2d 411 (1977); *Riggs* v. *State, supra; Sotelo* v. *State*, 264 Ind. 298, 342 N.E.2d 844 (1976). The testimony of eleven lay witnesses for the State indicated that petitioner was sane prior to, during and after the shooting of his wife. In addition, an electroencephalogram technologist at the Elkhart Clinic testified that petitioner told her he returned for a second electroencephalogram because the first test had not shown his insanity, as defense counsel had wished, and

that petitioner did not want to go along with an insanity defense. Finally, two experts testified to their opinions that petitioner was sane and capable of forming the requisite criminal intent when the shooting occurred. Thus while petitioner, his mother and two expert witnesses testified to petitioner's inability to form the requisite intent, the jury had sufficient basis to decide the insanity and intent issues against petitioner.

For the foregoing reasons, the judgment of dismissal is affirmed.

APPENDIX

APPENDIX A TO MAJORITY OPINION

The following colloquy between petitioner and Officer Miller was admitted into evidence as containing admissions and denials (R. 592-596):

> Mr. Miller: And before we do anything else, we have to advise you of your rights.
>
> Mr. Jacks: This is the first time anyone has advised me of anything.
>
> Mr. Miller: But you have—
>
> Mr. Jacks: And I have been incarcerated for over an hour.
>
> Mr. Miller: You have the right to—
>
> Mr. Jacks: Remain silent.
>
> Mr. Miller: Listen. You have the right to remain silent, anything you say can and will be used against you in a court of law. You have the right to an attorney and have him present with you while you're being questioned. If you're indigent or poor and cannot afford to hire an attorney, one will be appointed to represent you. At any time during this interview, if you desire not to talk to me, we can stop. Do you understand these rights?

Mr. Jacks: Yes.

Mr. Miller: Having these rights, do you wish to talk to me? You don't have to say anything about anything. Do you understand that?

Mr. Jacks: Sure.

Mr. Miller: Okay, here's your cigarette.

Mr. Jacks: My mother and father are on route from Illinois.

Mr. Miller: Did you call them or what?

Mr. Jacks: Just before I left, yea. They were on route with their own plane. They have their own airplane.

Mr. Miller: They're flying in.

Mr. Jacks: Right.

Mr. Miller: Now, I need to ask you some preliminary questions.

Mr. Jacks: I would like, first of all before we go any further, the officers are running around my house right now. I am not some kind of a machine gun maniac or something like that.

Mr. Miller: Do you have a license?

Mr. Jacks: I am a licensed dealer.

Mr. Miller: We know that. We know that.

Mr. Jacks: I didn't shoot my wife with a machine gun or anything else. And I would like them to understand that they are not scoring on some kind of a lunatic or something like that.

Mr. Miller: I don't think anyone has indicated that, have they?

Mr. Jacks: Well. I just got thrown in the slammer. That's all I know.

Mr. Miller: Well, I think that usually happens, doesn't it, when somebody gets shot? Is that right or wrong?

Mr. Jacks: That's right baby.

Mr. Miller: What is your full name?

Mr. Jacks: Edward Dennis.

Mr. Miller: D-E-N-N-I-S?

Mr. Jacks: Right, Jacks. J-A-C-K-S, Jr.

Mr. Miller: What is your date of birth?

Mr. Jacks: December 20, 1942.

Mr. Miller: You are how old?

Mr. Jacks: Uh, 33?

Mr. Miller: 33. Not quite.

Mr. Jacks: No. My wife passes me up every year, June 28th.

Mr. Miller: She's 33 now? Where do you work?

Mr. Jacks: You know where I work.

Mr. Miller: No, I really don't. You told me—

Mr. Jacks: I've got my own business, and you know exactly what I do.

Mr. Miller: No, I don't.

Mr. Jacks: I'm the police jobber, for firearms. I mean, that's it baby. What do you want me to do?

Mr. Miller: What company, I mean, your own company?

Mr. Jacks: Autoarms is the name of the company. A-U-T-O-A-R-M-S Limited. A-R-M-S. A-R-M-S. Limited.

Mr. Miller: Out of where?

Mr. Jacks: Out of my house.

Mr. Miller: This is your business?

Mr. Jacks: That's it.

Mr. Miller: You are a police arms, what? Supplier?

Mr. Jacks: Right, supplier, supplier. Let's put it that way. If you think I'm going to jump out of this chair here and attack this man, you're out of your mind.

Mr. Miller: Well, we need—We just need these precautions. These are the things that we do anyway.

Mr. Jacks: Listen, I know Robby, Steve Fervida is a personal friend of mine, and I'm not likely to jump out of the window, or jump up and grab this man's radio off this belt.

Mr. Miller: Do you know what has happened? Tonight?

Mr. Jacks: I'm not exactly sure what happened.

Mr. Miller: You're not exactly sure. Have you been drinking?

Mr. Jacks: As regards whatever happened this evening, I want to talk to my attorney.

Mr. Miller: Okay.

APPENDIX B TO MAJORITY OPINION

The following colloquy between petitioner and Officer Miller was suppressed by the trial court because coming after petitioner's first mention of counsel (R. 349-352):

Mr. Jacks: I'll be delighted to establish who I am, and where I live and what my name is and what my address is and everything else, but I am not going to say anything else.

Mr. Miller: Nothing else. Okay. You have that right.

Mr. Jacks: That's right.

Mr. Miller: So, if you have nothing to tell me other than that, then I'll send you back down.

Mr. Jacks: What do you want me to do?

Mr. Miller: It's up to you. Really.

Mr. Jacks: I want to know how my wife is.

Mr. Miller: Do you have any idea?

Mr. Jacks: Tell me how she is. She was hurt. I put blankets on her and everything else. Listen. This is no foolin' around. Will you find out for God's sake . . . how she is.

Mr. Miller: You want to find out?

Mr. Jacks: Yes, I do.

Mr. Miller: What's you home telephone number?

Mr. Jacks: You don't think she's at home, do you?

Mr. Miller: No, but there are people there.

Mr. Jacks: 246-1082

Mr. Miller: (Dials number)

(Security Radio Interjects)

Mr. Jacks: What?

Mr. Miller: Ah, he's a radio. He's got an internal radio.

Mr. Jacks: I heard that. What did they say?

Mr. Miller: No. Middlebury is bringing in a female juvenile. (Talking on telephone) Is Snyder there? Bud Miller.

Mr. Jacks: Can't you check with the hospital or something, I mean—

Mr. Miller: They will know there, I'm sure.

(Security Officer Paine Tells Another Security Officer, "Steve, I'll be on second floor for a while." Unaudible reply on radio. Paine replies, "Yea.")

Mr. Miller: How many do you have on duty? (talking to Paine)

Mr. Paine: Two.

Mr. Jacks: Can I have a glass of water? Can I have a glass of water, please?

Mr. Miller: Just a minute. There's a fountain at the end of the hallway. We'll get a drink when we go back down.

(Radio Traffic In Background)

Mr. Jacks: Am I accused or charged with something?

Mr. Miller: I would say so, yes.

Mr. Jacks: (Inaudible)

Mr. Miller: I don't have the charge but I would imagine the charge right now is Assault and Battery with the intent to commit a felony.

(Radio Paging Tone And Radio Traffic)

Mr. Miller: (Still on telephone) Yes, Terry? I have Mr. Jacks in my office. He has been advised of his rights. He wishes to con, confer with an attorney. Do you know what the condition is of his wife? She is dead. Okay. Okay. Okay. Okay. Oky-doak. Oky-doak. Okay. Alright. Okay. Alright. Alright. Goodbye. (Talking to Mr. Jacks) Do you understand that, Mr. Jacks? That your wife is dead? Do you wish to call an attorney?

Mr. Jacks: All I know at this point is that my mother and father are flying down here to talk with me. That's all that I know.

Mr. Miller: Okay, do you wish to call an attorney?

Mr. Jacks: No.

Mr. Miller: You do not wish to—

Mr. Jacks: No.

Mr. Miller: Call an attorney.

Mr. Jacks: I appreciate your advice, but I don't. Because I don't have an attorney here and—

Mr. Miller: Okay, then we'll go back downstairs.

Mr. Jacks: I don't know what to do.

Mr. Miller: I don't either. But the charge, you are being charged with first degree murder.

Mr. Jacks: I understand that.

Mr. Miller: You understand that?

Mr. Jacks: I understand that.

Mr. Miller: Okay. Let's go downstairs. The time of this recording is 7:00 P.M., August the 28th, 1975. Present were Sergeant Marlin W. Miller and Security Officer Charles Paine. Accused was advised of his rights and desired to have an attorney before talking to the police.

APPENDIX C TO MAJORITY OPINION

Court's Instruction No. 13

The Court instructs you that it is unlawful to intentionally commit an act forbidden by law which takes the life of another human being, unless the act is justified or legally excused, and the intent to do the act is criminal and imparts to said act the character of an offense, and one who violates the law, which he is conclusively presumed to know, cannot be heard to say that he had no criminal intent in doing the forbidden act.

Every man is presumed to intend the natural consequences of his acts, and when one does an illegal act, he is responsible for all the consequences that legitimately flow therefrom.

State's Instruction No. 4

You are instructed that the criminal law is an expression of the community's conscience or moral sense. It is important, therefore, to remember that when considering a defense to criminal responsibility, the mere proof that a certain mental condition existed at the time of the act, or that there is some causal connection between the mental state of the Defendant and the act itself is not enough. Rather there must be a showing that the Defendant's mind was so affected, he failed to recognize and appreciate his duty to society or complying with its code of acceptable behavior or that appreciating such fact, he lacked the capacity to conform his conduct to such requirements.

You are further instructed that to be responsible within the meaning of the term "criminal responsibility" means (1) to be able to recognize and discharge various duties and (2) to be morally censurable for the voluntary breach of those duties and legally liable if their violation is forbidden by law.

State's Instruction No. 5

You are instructed that where a specific intent is required to make an act an offense, such as in the charge preferred against the Defendant, it is not always possible to prove a purpose by direct evidence, for purpose and intent are subjective facts. That is, they exist within the mind of man, and since you cannot delve into a person's mind and determine his purpose and intent, you may look to all the surrounding circumstances, including what was said and done in relation thereto; bearing in mind the presumption of law, that every one is presumed to intend the natural and probable consequences of his voluntary acts, unless the circumstances are such as to indicate the absence of such intent.

When an unlawful act, however, is proved to be knowingly done, no further proof is needed on the part of the state in the absence of justifying or excusing facts, since the law presumes a criminal intent from an unlawful act knowingly done.

SWYGERT, *Circuit Judge,* dissenting. Edward Dennis Jacks has presented two grounds that necessitate the grant of his petition for a writ of habeas corpus. The use of State's Instruction No. 5 is a particularly egregious error made by the state trial court, for it impermissibly shifted the burden of proof on an essential element of the crime. In addition, the admission into evidence of his request to speak to a lawyer conflicts with numerous opinions of the Supreme Court and of this circuit.

I

The majority's holding that permits the use of State's Instruction No. 5 creates a dangerous precedent that shatters the foundation of our criminal justice system: that

every person is presumed innocent unless proven otherwise beyond a reasonable doubt. The trial judge instructed the jury that there is a "presumption of law, that every one is presumed to intend the natural and probable consequences of his voluntary acts, unless the circumstances are such as to indicate the absence of such intent." The majority must concede that absent the final phrase, the instruction would be identical to the instruction that was condemned in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979).[1] The majority relies on this final phrase and on other language in the instruction that the jury could look to surrounding circumstances and that any presumption of criminal intent may be rebutted by "justifying or excusing facts." They hold the instruction valid because the qualifying phrases and the tenor of other instructions "nullified the mandatory flavor of the language condemned in *Sandstrom*."

This holding ignores the nature of the two-part analysis in *Sandstrom*. The jury in that case might have interpreted the instruction given either as one creating an irrebuttable presumption or as one shifting the burden of proof to the defendant.[2] The Court held the instruction to violate the Due Process Clause under *either* interpretation. If the jury thought the presumption was mandatory, the instruction "would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.' " *Id.* at 521-523, quoting *Morissette* v. *United States*, 342 U.S. 246, 275

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[1] The instruction in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979) reads: "[T]he law presumes that a person intends the ordinary consequences of his voluntary acts."

[2] *Id.*, p. 517.

(1952).[3] If the jury believed the presumption to be rebuttable, the instruction would still be invalid, for, as the Court explicitly held in *In re Winship*, 397 U.S. 358, 364 (1970), "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact *necessary to constitute the crime with which he is charged.*" (emphasis added)[4]

The Court in *Sandstrom* followed several previous cases concerning instructions that had shifted the burden of proof to the defendant. In *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), the Court held unconstitutional an instruction that permitted the inference of malice if the jury found the homicide in question was both intentional and unlawful, unless the defendant showed by a preponderance of the evidence that the crime had been committed in the heat of passion on sudden provocation. Under Maine law, malice was an essential element of the crime of murder. By requiring the defendant to prove he had acted in the heat of passion, the Maine rule shifted to the defendant the burden of proof on the question of malice, which was a "fact necessary to constitute the crime with which [defendant] was charged."[5] The Court held the Due Process Clause precluded any such shift on an essential element of the crime. If the defendant raised the heat of passion as a defense, the State would have to bear the burden of proving its absence.[6]

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[3] *See also United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978).

[4] *Sandstrom, supra*, p. 524.

[5] *In re Winship*, 497 U.S. 358, 364 (1970).

[6] *See also Hankerson* v. *North Carolina*, 432 U.S. 233 (1977) (instruction reversing burden of proof on issue of self-defense invalid under *Mullaney*).

The Supreme Court has permitted a shift in the burden of proof only with respect to factors that did not constitute elements of the crime charged. In *Patterson* v. *New York*, 432 U.S. 196 (1977), the Court held that New York did not violate the Due Process Clause by requiring a murder defendant to prove by a preponderance of evidence the affirmative defense of extreme emotional disturbance to reduce the crime to manslaughter. In New York, there were only two elements to the crime of second-degree murder: (1) "intent to cause the death of another person," and (2) "caus[ing] the death of such person or of a third person."[7] Malice aforethought was not an element of the crime. The statute provided that a defendant could reduce the charge to manslaughter if he proved that he had "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse."[8] Because the State had proved the two necessary elements of second-degree murder in *Patterson*, the Court held that due process did not require it to prove the absence of the affirmative defense.

In so ruling, the Court relied on *Leland* v. *Oregon*, 343 U.S. 790 (1952), which had held that Oregon could shift the burden of proof on the insanity defense so long as the state had already proved beyond a reasonable doubt every element of the crime, including premeditation and deliberation.[9] The Court succinctly stated the distinction between *Patterson* and *Leland* on the one hand and *Mullaney* and *Sandstrom* on the other. Under *Patterson* and *Leland*,

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[7] N.Y. Penal Law § 125.25 (McKinney 1975).

[8] Id.

[9] *See also Rivera* v. *Delaware*, 429 U.S. 877 (1976) (appeal claiming that the *Winship* and *Mullaney* decisions had overruled *Leland* dismissed as not presenting a substantial federal question).

> once the facts constituting a crime are established beyond a reasonable doubt, based on all the evidence including the evidence of the defendant's mental state, the State may refuse to sustain the affirmative defense of insanity [or extreme emotional disturbance] unless demonstrated by a preponderance of the evidence.

Patterson, supra, p. 206. The burden could not be reversed, however, on any of the facts constituting the crime.

These cases demonstrate that the majority's analysis of *Sandstrom* is misplaced. *Sandstrom* did not overturn the instructions in that case because they created a conclusive rather than a rebuttable presumption. The Court held the instruction unconstitutional because it shifted the burden of proof on intent, an essential element of the crime charged.[10] The instruction in this case suffers the same infirmity, for it reverses the burden of proof on intent. The instruction tells the jury that "one is presumed to intend the natural and probable consequences of his voluntary acts, *unless* the circumstances are such as to indicate the absence of such intent." (emphasis added) As the majority notes in its opinion, *supra,* p. 9, "the jurors were told . . . that any presumption of 'a criminal intent from an unlawful act knowingly done' was *rebuttable* by 'justifying or excusing facts.'" Because under Indiana law in-

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[10] The Montana statute under which *Sandstrom* was prosecuted reads in relevant part:

> (1) [C]riminal homicide constitutes deliberate homicide if:
>
> (a) it is committed purposely or knowingly; or
>
> (b) it is committed while the offender is engaged in or is an accomplice in the commission of, an attempt to commit, or flight after committing or attempting to commit robbery, sexual intercourse without consent, arson, burglary, kidnapping, felonious escape, or any other felony which involves the use or threat of physical force or violence against any individual. . . .

R.C.M., § 94-5-102 (1977).

tent is one of the constituent elements of first-degree murder,[11] the crime for which Jacks was convicted, the reversal of the burden of proof on that issue violated his Due Process rights. We cannot be sure that the text of the other instructions mitigated the effect of the improper language in Instruction No. 5. As *Sandstrom* points out, "even if a jury *could* have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they *did* do." *Id.* p. 526 (emphasis in original). The petition for a writ of habeas corpus should therefore be granted.

II

I must also dissent from the majority's holding that the admission into evidence of petitioner's request for counsel was not prejudicial error. The majority's attempted distinction of *Doyle* v. *Ohio*, 426 U.S. 610 (1976), and *United States* v. *Hale*, 422 U.S. 171 (1975), is faulty. The opinion states that the two cases are inapplicable because the prosecution, in introducing the tape-recorded conversation, was not attempting to use petitioner's silence against him.[12] If that statement were true, then there would not have been any reason to have played the recording for the jury. During the conversation, Jacks never told the police anything except basic information such as his name, age, address,

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[11] The Indiana murder statute reads,

> A person who:
>
> (1) Knowingly or intentionally kills another human being; or
>
> (2) Kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery; commits murder, a felony.

I.S.A., Crimes, § 35-42-1-1 (Burns 1979).

[12] Majority opinion, *supra*, p. 3.

and occupation. Any reading of the transcript in Appendix A would show that the only reason to introduce the tape into evidence was to inform the jury that Jacks had said he would not talk to the police until he had spoken to his lawyer. None of the rest of the conversation was at all useful to the jury.

A request for an attorney is extremely prejudicial in a case involving an insanity defense.[13] The case is indistinguishable from *United States* v. *Matos*, 444 F.2d 1071 (7th Cir. 1971), in which this court held that the introduction of a postal inspector's testimony that the defendant "indicated he did not want to make a statement" was plain error, and from the *Doyle* and *Hale* decisions.[14] If Jacks had said no more than, "I would like to speak to a lawyer," then there is no doubt that this statement would not be admissible.[15] The mere fact that he had answered a few innocuous questions before he made that statement should not render his request for counsel admissible; nor should such trivial responses amount to a waiver of his constitutional right to remain silent. Similarly, the fact

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[13] The majority states, *supra*, n. 1, that any error in the admission of this statement would be harmless. The footnote does not cite any opinion that so holds. Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967). Considering the sanctity of *Miranda* rights (*see* n. 16 below) and the prejudice to the defendant in this case, I believe this error necessitates that the petition for a writ of habeas corpus be granted. *United States* v. *Matos*, 444 F.2d 1071, 1073-74 (7th Cir. 1971).

[14] *See also United States* v. *Nielsen*, 392 F.2d 849 (7th Cir. 1968).

[15] *Doyle* v. *Ohio*, 426 U.S. 610 (1976); *United States* v. *Hale*, 422 U.S. 171 (1975); *Baker* v. *United States*, 357 F.2d 11 (5th Cir. 1966).

that Jacks testified freely at *trial* is irrelevant to his request for counsel at the time of his *arrest*. *Miranda* rights are too sacred and too fundamental as protection of the guarantee of a fair trial to rest upon so unstable a foundation.[16]

III

While I agree with the majority that *Hussong* v. *Warden*, 623 F.2d 1185 (7th Cir. 1980), controls our decision on the issue of admission into evidence of the illegally-recorded conversation between Jacks and his mother, I would like to add two comments regarding that portion of the opinion.

The trial judge's instruction to the jury that it could consider the contents of the tape for the question of petitioner's sanity, but not as to whether Jacks had committed the crime charged, is gross error. The only issue in the case was Jacks' sanity. He admitted that he had committed the act that resulted in his wife's death, but he only could have been guilty of the crime charged if he was in fact sane. The trial court's instruction therefore permitted the jury to consider the contents of the tape on the ultimate issue in the case. As the majority notes, however, under *Hussong*, this error does not constitute grounds for granting the writ of habeas corpus.

Furthermore, *United States* v. *Stewart*, 443 F.2d 1129 (10th Cir. 1971), is not at all authority on this question.

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[16] The sanctity of *Miranda* rights was recently reaffirmed by the Supreme Court in *Edwards* v. *Arizona*, No. 79-5269, 49 U.S.L.W. 4496 (May 18, 1981) (Once a defendant has invoked his right to counsel, police may not initiate further interrogation in counsel's absence.), and in *Estelle* v. *Smith*, No. 79-1227, 49 U.S.L.W. 4490 (May 18, 1981). The majority's attempted distinction of *Edwards* suffers the same infirmities as the faulty distinctions of the *Doyle* and *Hale* cases.

That case concerned the admissibility of lay testimony on the issue of sanity and also the sufficiency of evidence of mental capacity. The admissibility of the tape-recorded conversations was never in dispute in the case. The statement quoted by the majority, *supra*, p. 7, concerning the conversations' probative effect is dictum and had little to do with the decision in the case.

I would grant the writ of habeas corpus for the reasons discussed in parts I and II of this dissent.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

EDWARD DENNIS JACKS, JR.	:	
Petitioner	:	
v.	:	No. S 79-308
JACK DUCKWORTH, Warden	:	
Respondent	:	

MEMORANDUM AND ORDER

This Court now considers the petitioner's motion filed pursuant to 28 U.S.C. § 2254 requesting a writ of habeas corpus to issue. Petitioner, Edward Dennis Jacks, Jr., is a state prisoner who is presently incarcerated at the Indiana State Prison for his conviction for First Degree Murder. Petitioner was found guilty after a jury trial in November, 1976, and he received a sentence of life imprisonment. Petitioner took a direct appeal to the Supreme Court of Indiana raising several matters, including essentially the same issues presented in this petition. The Supreme Court of Indiana decided all issues adversely to petitioner and entered its findings and determination in its opinion cited in *Jacks* v. *State*, ... Ind. ....., 394 N.E. 2d 166 (1979). This Court has made a careful review of the state court record in this criminal case as mandated by *Townsend* v. *Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963). After careful consideration, and for the reasons stated below, this Court finds no merit in petitioner's contentions and therefore denies his application for a writ of habeas corpus.

The petitioner in this cause has set forth five grounds for relief. In addressing the alleged grounds for habeas corpus relief, it should be observed that the record of the

state court proceedings contains sufficient facts upon which the Indiana courts could properly resolve the matters under consideration. Indeed, the state record demonstrates that the petitioner was given a full, fair, and adequate opportunity to bring out all pertinent information and evidence at the trial level. Therefore, any relevant factual determinations of the Supreme Court of Indiana with respect to the present issues are entitled to deference by the Court and should be accepted in this proceeding. See 28 U.S.C. § 2254(d); *Swain* v. *Pressley*, 430 U.S. 372, 97 S. Ct. 1224, 51 L. Ed. 2d 411 (1977); *United States ex rel Clark* v. *Fike*, 538 F. 2d 750 (7th Cir.1976); *Tanner* v. *Vincent*, 541 F. 2d 932 (2d Cir. 1976), *cert. den.*, 97 S. Ct. 794; *United States ex rel McNair* v. *State of New Jersey*, 492 F. 2d 1307 (3d Cir. 1974). Petitioner's motion for an evidentiary hearing and oral argument is, therefore, respectfully denied.

I.

Petitioner first contends that it was error for the state to use at trial a tape recording of an intercepted telephone conversation between himself and his mother. Petitioner maintains further that the telephone conversation was obtained in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, and therefore its use at his trial was a denial of his rights rendering his conviction constitutionally infirm.

A review of the record shows the state prosecutor did use, for impeachment purposes only, a taped telephone conversation made August 28, 1975, between the petitioner and his mother. The call was placed from the Elkhart County Jail, where petitioner was being held pending formal charges in the murder of his wife, to the residence of his mother in Lake Forest, Illinois. There was no court order for the telephone tap and the state, at trial, readily admitted the evidence was gathered in violation of 18

U.S.C. § 2510 et seq. The state contended then, as it does now, it was only as rebuttal evidence that the tape recorded telephone call was used at trial, and, therefore, exclusion of the evidence is not mandated by the Fourth Amendment.

Petitioner maintains that the taped conversation cannot be used in any way at trial because the telephone line was not legally tapped and Title III of the Omnibus Crime Control Act of 1968 prohibits use at trial of such evidence. Petitioner argues, in the alternative, that even if such evidence could be introduced for the limited purpose of impeachment on rebuttal, the tapes should have been excluded in this case because the state's impeachment was a sham. Petitioner argues the impeachment was mere pretense and subterfuge for introducing on rebuttal what could not have been introduced during the state's case in chief. Finally, petitioner contends the tape should have been excluded from trial, in any event, because a proper foundation was not established by the state for its introduction of the rebuttal evidence.

The threshold issue is whether evidence procured by means of a wiretap may be introduced by the government for impeachment purposes without a prior determination by the trial court that the wiretap was lawful. Although the prohibition against use of evidence gained by an illegal wiretap is broad in scope as one reads Title III of the Omnibus Crime Control Act of 1968, it has been found that the Act does not prevent the use of the evidence for impeachment purposes. *United States* v. *Caron*, 474 F. 2d 506 (5th Cir. 1973). The court in *Caron* found that use of tape recordings, although illegally gathered, was permissible at trial for impeachment of the defendant who testified in his own behalf. In *Caron*, the defendant denied being engaged in any criminal bookmaking activity when questioned on direct examination by his defense counsel. Upon cross-exam, the defendant repeated the denial. It was at this

time the government sought to introduce the tape recordings of the telephone conversation previously taped which impeached the defendant's testimony. The *Caron* court relied on *Walder* v. *United States*, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954) in finding that the use of the tape recordings, solely for impeachment purposes, was permissable. The Supreme Court of the United States in *Walder* found that although the government cannot make an affirmative use of evidence unlawfully obtained, the defendant would not be permitted to shield his guilt behind the exclusion of the evidence and perjured testimony. In *Walder*, the court allowed the use of illegally seized evidence to impeach the defendant's direct examination assertion that he was innocent of any narcotics activities. The Fifth Circuit Court of Appeals applied the *Walder* rationale to the unique factual setting in *Caron* which dealt with wiretaps. The *Caron* court directly addressed the issue of whether the statutory exclusion of any evidence gathered in violation of Title III of the Omnibus Crime Control Act would prevent the use of evidence for impeachment. After an examination of the legislative history of the Act,[1] the *Caron* court found the exclusionary principle stated in the Act should not be construed as preventing the introduction of evidence to impeach a witness. *Caron, supra*, p. 509. The court further found the scope of the suppression role of the Act should parallel the present state of search and seizure law and thus, the Act would not be read to exclude the use of illegally gathered evidence for impeachment.[2]

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[1] S. Rep. No. 1097, 90th Cong., 2d Sess., 1968 U.S. Code Cong. & Adm. News, pp. 2184-85.

[2] *But cf. United States* v. *Manuszak*, 438 F. Supp. 613 (E.D. Pa. 1977) (court refused to extend the *Caron* rationale to a probation revocation hearing where government sought to use illegally gathered evidence for other impeachment purposes). *See also, Volpicelli* v. *Salamack*, 447 F. Supp. 652 (S.D. N.Y. 1978).

Petitioner attempts to discredit any reliance on the *Caron* case distinguishing it upon the facts from his trial. Upon a scrutiny of the testimony from the record in petitioner's case, however, this Court finds the application of the reasoning in *Caron* to be singularly appropriate. It is obvious that neither the petitioner nor his mother, as witnesses at trial, answered all the questions concerning telephone calls candidly or truthfully. On direct examination by defense counsel, Helen Jacks stated she only spoke with her son on one occasion, August 27, 1975. (R. p. 644, l. 25-27). On cross-examination, armed with a transcription of the August 28, 1975 telephone conversation, the prosecutor began his impeachment. It was only upon questioning by the prosecutor on cross-examination that Helen Jacks admitted to a telephone conversation on August 28. Likewise, upon direct examination, the petitioner testified he only spoke with his father on August 28, 1975 and no one else. (R. p. 688, l. 11-17). Once again, it was only upon cross-examination, when confronted with questions concerning the taped telephone conversation, did the petitioner vaguely recall a telephone conversation with his mother.

Finding their answers to be less than truthful, it is settled law that the prosecution could use even unlawfully gathered evidence to impeach the witnesses. *Oregon* v. *Hass*, 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975); *Harris* v. *New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971); *Walder, supra; Caron, supra.* The scope of the law in this area is stated definitively in *Harris, supra.* There the court held that statements gathered in violation of a defendant's rights as outlined in *Miranda* could be used solely for impeachment purposes at trial. The *Harris* court held the impeachment process provided a valuable aid to the jury in assessing the credibility of the defendant. Although a defendant is privileged to testify in his own

behalf, that privilege cannot be construed to include a right to commit perjury. *Harris*, 401 U.S. at 226, 91 S. Ct. at 645. When faced with perjured testimony, the state could resort to the use of unlawfully gathered evidence as rebuttal.

This Court is not swayed by petitioner's argument that the impeachment of petitioner and his mother was a sham. Petitioner alleges that because both he and his mother referred only to telephone conversations on August 27, 1975, in their answers on direct examination, then cross-examination on conversations occurring on August 28, 1975, were beyond the scope of direct. Petitioner contends, therefore, that *Harris, Caron* and *Walder* are distinguishable because in those cases the testimony sought to be impeached was brought out on direct examination. Petitioner misreads the scope of examination of the witness and himself. The door was opened, upon direct examination, concerning telephone conversations between the petitioner and his parents. When both petitioner and his mother incorrectly stated they had no conversation with each other on August 28, 1975, that testimony was subject to impeachment upon cross-examination. *United States* v. *Tweed*, 503 F. 2d 1127 (7th Cir. 1974) (court admitted tainted evidence after defendant on direct examination testified inconsistently with tainted evidence); *United States* v. *Mariani*, 539 F. 2d 915 (2d Cir. 1976) (defendant may not be impeached by illegally obtained evidence unless he opens door on direct examination). Faced with the obvious discrepancy of the witness' testimony and the taped conversation, the prosecutor was well with the bounds of *Harris* and *Caron* to challenge the testimony of the petitioner and his mother concerning the telephone calls. This Court finds no error in the use of the taped telephone conversation for impeachment purposes.

Petitioner's contention that the tape of the telephone conversation was inadmissible because of the state's failure to lay a proper foundation is without merit. The question of admissibility of certain kinds of evidence is a question of state law. A review of the record[3] shows the state laid a foundation for the admission of the tape. The trial court overruled the defense objections to admissibility based upon improper foundation. No constitutional error is apparent from a reading of the record. The discretion of the state court judge will not be questioned in this motion and the finding of admissibility will not be disturbed.

II.

Petitioner next contends the admission at trial of portions of a tape recording of a conversation between himself and a police officer, Miller, was in violation of his due process rights guaranteed by the Fourteenth Amendment. The conversation occurred at the police station on the night petitioner was arrested. The tape recording was made by the interviewing officer and it was played to jury after being admitted into evidence at trial. This tape revealed a conversation between the officer and petitioner in which the officer advised petitioner of his constitutional rights pursuant to *Miranda* v. *Arizona,* 384 U.S. 486, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). These rights were acknowledged by the petitioner and the conversation then continued as to the events of the evening. The subject matter of the conversation included the petitioner's employment, his wife's occupation and the fact that he was a licensed gun dealer. Petitioner also discussed the fact that his parents were coming from Illinois to join him in Indiana. After further discussion, the petitioner stated to the police offi-

[3] R. pp. 840-842.

cer: "As regards what happened this evening, I want to talk to my attorney." The police officer agreed, and the conversation ended. Petitioner objects to this last portion of the tape being played to the jury.

Prior to trial, a hearing was held on the petitioner's motion to suppress the tape recording of the conversation.[4] At trial, after further argument,[5] the court granted in part the motion to suppress and directed that no portion of the tape beyond the declaration by the defendant that he wished to speak to his attorney be played.[6] Petitioner now contends the portion that was played violated his right to remain silent in that it was prejudicial for the jury to hear him invoke the rights to an attorney and to remain silent. Petitioner relies on *Doyle* v. *Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), which held it violated the due process clause of the Fourteenth Amendment for the prosecution to use an accused's post-arrest silence for impeachment purposes.

Petitioner's reliance upon *Doyle* is misplaced. That case dealt with a situation where the failure of defendant to respond to the accusations was exploited by the prosecution to impeach the defendant's trial testimony. In this case, however, much more was said than the mere invocation of silence or request for an attorney. Petitioner carried on an extended conversation with the police officer. He was fully aware of his rights under *Miranda* v. *Arizona, supra*. He chose to carry on a conversation with the officer for some time before requesting to remain silent and to speak with an attorney. No portion of the tape was introduced as evidence once the petitioner stated his request. The

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[4] R. pp. 342-359.

[5] R. pp. 549-554.

[6] R. pp. 554-555.

statement is a logical conclusion of the conversation. Not to include the request may have caused confusion for the jury. Having scrupulously afforded petitioner his Miranda rights, the state did not violate them by offering the portion of the tape recording made previous to petitioner's request for an attorney. No prejudice is found.

III.

Petitioner next argues the state failed to prove beyond a reasonable doubt that the defendant was legally sane at the time of the commission of the offense. After a complete review of the record in petitioner's case, this Court finds, that, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the petitioner was sane, at the time of the offense, beyond a reasonable doubt. *Jackson* v. *Virginia,* ..... U.S. ....., 99 S. Ct. 2781, ... L. Ed. 2d ..... (1979).

IV.

As to petitioner's fourth ground concerning the giving of court's instruction No. 13 to the jury, the Supreme Court of Indiana held as follows:

> "Court's instruction number thirteen, which dealt with criminal intent, was not objected to by the defendant at the time it was given. He first raised objection to it in his motion to correct errors. Since he did not object at the time the instruction was given, any error is waived and we will not consider it. *Murphy* v. *State, supra; Bell* v. *State,* (1977) Ind., 366 N.E. 2d 1156, 1160" *Id.,* at 173

The legal determination of the Supreme Court of Indiana on appeal that in light of Indiana law the petitioner waived the alleged instruction No. 13 issue is binding on this Court and precludes consideration of the issue in the present

habeas corpus review (even if the petitioner's claim has constitutional implications) absent a showing of cause by the petitioner for his failure to make a timely objection and actual prejudice. *Wainwright* v. *Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977); *Francis* v. *Henderson*, 425 U.S. 536, 96 S. Ct. 1708, 48 L. Ed. 2d 149 (1976); *Blenski* v. *LaFollette*, 581 F. 2d 126 (7th Cir. 1978); *United States ex rel Maxey* v. *Morris*, 591 F. 2d 386 (7th Cir. 1979). *Blenski* v. *LaFollette*, *supra*, is especially pertinent to this discussion as the court in that case considered the situation where a defendant fails to object to a jury instruction. In discussing the matter, the court in *Blenski* stated in part, as follows:

> "The issue of reviewability of a federal claim which the state declined to pass upon was considered by the Court in *Wainwright* v. *Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977). In *Sykes* the federal claim of admission of inculpatory statements obtained in violation of rights under *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), had not been resolved on the merits in the state proceeding because the claim had not been presented in the manner prescribed by state procedural rules: no contemporaneous objection had been made. The Court noted that many interests are served by a contemporaneous objection rule, 433 U.S. at 88-89, 97 S. Ct. 2497, and stated that '[a]ny procedural rule which encourages the result that [a criminal trial] be as free of error as possible is thoroughly desirable. . .' *Id.*, at 90, 97 S. Ct. at 2508. The Court therefore held that absent a showing of 'cause' and 'prejudice' attendant to the failure to make timely objection, federal habeas review is unavailable.
>
> We find the reasoning of *Sykes* equally persuasive in a federal habeas challenge to jury instructions which were not objected to in a timely manner. A decision on the issue of the constitutionality of jury instructions also should have the benefit of full consideration

> at the trial court level. Wisconsin law is clear: The failure to make timely objection to jury instructions constitutes a waiver of any alleged defects in those instructions. *State* v. *Davis*, 66 Wis. 2d 636, 225 N.W. 2d 505 (1975). Thus, unless a petitioner established 'cause' for his failure to object timely and that he was 'actually prejudiced' by use of the instruction, he is not entitled to habeas relief." *Id.*, 581 F. 2d at 129-130.

Since the petitioner has never shown the requisite cause and actual prejudice, the petitioner's present claim is not an appropriate subject for federal habeas corpus, and accordingly, petitioner's fourth ground as a basis for habeas corpus relief is DENIED.

V.

Petitioner's final ground concerns the fact that state's instructions Nos. 4 and 5 were given to the jury over defense objection. Petitioner claims that these instructions ". . . permitted the jury to presume that the defendant was (1) sane at the time of the alleged offense, and (2) that he possessed the requisite criminal intent at the time of the offense in violation of his constitutional rights. However, it is clear that Jacks was not denied any constitutional rights as a result of the giving of state's instructions Nos. 4 and 5. These instructions are set out in *Jacks* v. *State*, ... Ind. ....., 394 N.E. 2d 166, 174 (1979).[7]

Questions concerning instructions are normally matters of state law and are not cognizable in federal habeas corpus. *Henderson* v. *Kibbe*, 431 U.S. 145, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977); *Chance* v. *Garrison*, 537 F. 2d 1212 (4th Cir. 1976); *Manning* v. *Rose*, 507 F. 2d 889 (6th Cir. 1974). Only where th giving of an instruction is so prejudicial as to amount violation of due process and funda-

[7] R. pp. 273-274.

mental fairness will a habeas corpus claim lie. 28 U.S.C. § 2254(a); *Henderson* v. *Kibbe, supra; United States ex rel Smith* v. *Fogel,* 403 F. Supp. 104 (N.D. Ill. 1975). In *Henderson* v. *Kibbe, supra,* the Supreme Court of the United States made the following relevant observations:

> "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violated due process,' *Cupp* v. *Naughton,* 414 U.S. 141, 147, 94 S. Ct. 396, 400, 38 L. Ed. 2d 368, not merely whether 'the instruction is undesirable, erroneous or even 'universally condemned,' ' *Id.,* at 146, 94 S. Ct., at 400."
> Id., 97 S. Ct. at 1736-1737.

In this case, the giving of state's instructions Nos. 4 and 5 was not a violation of a fundamentally fair trial. Regarding state's instruction No. 4, the Supreme Court of Indiana determined that, although the instruction was unnecessary, it was ". . . a reasonable explanation in view of all the other instructions, including court's instruction number twenty-two, and was to be considered with all other instructions." *Jacks* v. *State, supra,* at 174. It is, of course, axiomatic that instructions must be viewed as a whole. *Cupp* v. *Naughten,* 414 U.S. 141, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973). The court had previously found that instruction No. 22 was a correct statement of the law concerning the sanity issue. *Id.,* at 173-174. Accordingly, the court found no error in the giving of the instruction. *Id.,* at 174. Moreover, an examination of the instruction reveals that it did not require the jury to presume anything regarding petitioner's insanity defense or his intent.

Similarly, state's instruction No. 5, read as a whole, did not require or mandate the jury to presume anything with respect to "intent" and therefore, was not violative of principles enunciated in *Sandstron* v. *Montana,* ..... U.S. ....., 99 S. Ct. 2450 (1979). *Jacks* v. *State, supra,* at 175. In its opinion, the Supreme Court of Indiana properly distinguished the instruction in the petitioners' case from the mandatory one in *Sandstrom,* as follows:

> "Further, however, it would appear the instruction given in this case does not have either the conclusive or burden-shifting effect the Court found repugnant in the *Sandstrom* case. 'Sandstrom's jurors were told that 'the law presumes that a person intends the ordinary consequences of his voluntary acts.' They were not told they had a choice, or that they might infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory.' ..... U.S. at ....., 99 S. Ct. at 2454. In the present case the trial court did make the statement found in *Sandstrom.* However, the court qualified it by stating that the jurors were to look to all of the surrounding circumstances, including what was said and done in relation to the acts, and that everyone is presumed to intend the natural consequences of his voluntary acts *unless* the circumstances are such as to indicate the absence of such intent. The second paragraph of State's instruction number five says that '[w]hen an unlawful act, however, is proved to be knowingly done, no further proof is needed on the part of the State *in the absence of justifying or excusing facts. . .*' Record at 274 (emphasis added). Therefore, we do not feel that this instruction was as limited and mandatory in effect as the United States Supreme Court found the instruction in *Sandstrom* to be. We find no error as to this issue."

Id., at 175.

Therefore, it is apparent that petitioner's claims concerning state's instructions Nos. 4 and 5 present no grounds for relief.

The petitioner is denied any habeas corpus relief under 28 U.S.C. § 2254 and this case is DISMISSED.

Enter April 11, 1980.

/s/ Allen Sharp

JUDGE, UNITED STATES DISTRICT COURT.

cc: E. Jacks, Jr.
N. Stanton
D. Steiner
order book

APPENDIX B

Factual background (from Petitioner's Memorandum of Law as filed in the Habeas Proceedings in the U.S. District Court).

On September 4, 1975, Edward D. Jacks, Jr., was indicted for first degree murder by the Elkhart County Grand Jury for the August 28, 1975, death of his wife, Kathleen B. Jacks. (R. 78). Prior to this, Jacks, who was 33 years old and owned and operated Autoarms Limited, a firm which sold firearms to police agencies and foreign countries, and who is from a family of professional people, had never been in any trouble with the law. (R. 297-98).

On September 17, 1975, Jacks filed a discovery motion (R. 83) which was granted the following day. (R. 325-27). In part, Jacks requested "(a)ny written or *recorded statements* and the substance of any oral statements made by the accused . . ." (R. 83, emphasis added). Thereafter, Jacks was arraigned on October 30, 1975, and entered a plea of not guilty by reason of insanity. (R. 101, 328).

After obtaining a change of judge and employing new counsel, Jacks filed a "Motion to Suppress Evidence" (R. 173) on November 1, 1976; and two brief hearings were held on the motion on November 1st and 3rd, 1976, immediately prior to trial. (R. 343-62). The "Motion to Suppress Evidence" sought to keep the State from placing into evidence a police-made tape-recording of a conversation Jacks had with Detective Sergeant Marlin Wayne Miller on August 28, 1975, shortly after Jacks was arrested. (The entire text of the Jacks-Miller tape was played to the court prior to trial at the November 1st hearing (R. 345, l.3, through 352, l.121).

The Court indicated that it would rule on the suppression motion during trial (R. 362). During trial, but outside the presence of the jury, the issue of the admissibility of the Jacks-Miller tape was argued further. (R. 549-56). Defense counsel urged that "the prosecution is not allowed to use a statement by the defendant, who was in custody, that he exercises in any way his constitutional right . . ." (R. 551, ll.17-20). The trial court, however, ruled (R. 554, l.21 through 555, l.4) that the Jacks-Miller tape could be played through Jacks' statement, "As regards whatever happened this evening, I want to talk to my attorney," and officer Miller's reply "Okay."

When the State attempted to play the Jacks-Miller tape before the jury, Jacks again objected (R. 592 and 596); but the Court nonetheless allowed the portion of the tape to be played which included Jacks' above-quoted assertion of the right to counsel, (R. 596, l.7); and later, in closing argument, the State quoted the request for counsel once again. (R. 931, ll.11-13). This issue was raised on direct appeal and, earlier before the trial court, as point II in Jacks' "Motion to Review and Weigh the Evidence and to Correct Errors." (R. 5-6).

A second issue litigated before the trial court, and the Supreme Court of Indiana also involved the State's use of a surreptitiously made tape-recording of an August 28, 1975, telephone conversation between defendant and his mother, Helen Jacks. The existence of such a tape-recording was first hinted at by the nature of the State's cross-examination of Helen Jacks, (R. 645-51), wherein the Prosecuting Attorney substantially read into the record a conversation which was later admitted into evidence, over defense counsel's objection, in the State's rebuttal. (R. 848-50). Before the State's rebuttal, however, the State once again substantially read the Jacks-Jacks telephone conver-

sation into the record during the State's cross-examination of the defendant. (R. 706, l.18, through 710, l.7).

On November 9, 1976, during the trial, but outside the hearing of the jury, Jacks moved for a mistrial due to the State's use of the non-disclosed tape, which motion was overruled:

> MR. SMITH: The defendant would move for mistrial based on the introduction of the, what amounts to the transcript of the tape recording of the conversation between Mrs. Jacks, uh, Mrs. Ed Jacks, and the defendant, Dennis Jacks while he was in custody in the Elkhart jail, and that is that, there was here a violation of the discovery rules of the state of Indiana because the, at no time, did the statement of the defendant, and at no time did the state tender or even make us aware of a surreptitious wire tap, what amounts to a wire tap, without the knowledge of the defendant Dennis Jacks. They didn't even inform us that they had one and of course they didn't inform us of the content of that conversation.
>
> THE COURT: I meant to—What's your answer to that Mr. Cosentino?
>
> MR. COSENTINO: We had no responsibility to do so, Your Honor, at all. The rules of discovery in a court order provides that we are to inform them of any evidence that we had in our (sic) possession, that the state would use in its case in chief. We are not required to give the defendant any rebuttal evidence or any evidence that we may or may not use as a part of the rebuttal part of the state's case.
>
> MR. SMITH: The state is always required to give a statement, any statement of the defendant.
>
> THE COURT: Do you have a written motion or just the oral motion?
>
> MR. SMITH: Just the oral motion.

MR. COSENTINO: Your Honor, may I add to my statement?

THE COURT: Yes.

MR. COSENTINO: In the event the defendant felt that way, the proper remedy is ask the court for a continuance so he can have time to look at the tape and look at the evidence. It's not proper that it's a mistrial, he's entitled to time to look at it.

THE COURT: Well, when it came us (sic) yesterday, I wondered about that, there was no question raised about it at that time, I took it for granted that if you didn't have the contents of the tape, you probably would have objected at that point. Could have ruled on it at that time, it's a little late now.

MR. SMITH: The prosecutor started asking questions, I didn't even know at that point, that they had a tape. They just started asking questions about did you say this to him and did you say that to him and uh, further, Your Honor, that could have well affected the decision of whether or not to put, number one, to put Mr. Jacks on the stand, and his mother on the stand. And without that knowledge, uh, it was a tremendous disadvantage for the defense in this case.

THE COURT: Well, the motion's been noted and motion's denied. Call the jury.

(R. 719-21)

The issue of the Jacks-Jacks tape, which was made via an illegal wiretap by the State's own admission (R. 836, ll.20-26; 837, ll.15-21; 838, ll.5-6), next came up immediately prior to the testimony of Sgt. Marlin W. Miller as a rebuttal witness for the State. Prosecutor Cosentino admitted that, "There is no question that the state could not have introduced this tape as a part of the state's case in chief," and added that "Its only on rebuttal that the state has the opportunity to, in fact, introduce illegal evidence. . ." (R. 838). Immediately thereafter, Jacks objected to

the playing of the tape to the jury under the collateral evidence rule. The precise wording of the objection was that the taped telephone conversation would bear solely "on a completely side issue. . ." (R. 839, ll.9-10). Defense counsel also objected to the playing of the Jacks-Jacks tape due to the admitted violation of the federal wiretap laws (R. 841, ll.8-9; 845, ll.24-26) and for various other reasons.

As in his Brief to the Supreme Court of Indiana, and in this memorandum, Petitioner Jacks urges that: (A) if the tape was played to show Jacks' tone of voice, the language he used, the appropriateness of his replies to his mother, etc., to bear on the issue of sanity, then the tape was not admissible under the federal wiretap laws. (B) If the tape was played to allegedly bear on the credibility of Jacks and/or his mother, then the tape was not admissible under the collateral evidence rule, since the matters touched upon in the tape were raised solely on cross-examination and are collateral to the issues of guilt or innocence and sanity or insanity. The trial court, however, admonished the jury, just prior to allowing the tape to be played, that the tape could be considered on the issue of the credibility of Jacks and his mother and on the issue of sanity, but *not* on the issue "as to whether or not the crime charged has, in fact been committed." (R. 848, ll.1-7).

The tape was then played for the jury:

HELEN JACKS: Hello?

EDWARD JACKS: Hello.

HELEN JACKS: Hello?

EDWARD JACKS: Mom?

HELEN JACKS: Denny?

EDWARD JACKS: Hello.

HELEN JACKS: Yes?

EDWARD JACKS: Where's Dad?

HELEN JACKS: He's next door at your neighbor's.

EDWARD JACKS: Well, I'm in jail.

HELEN JACKS: I know it. Well, how do you feel about that? That's what you wanted, wasn't it?

EDWARD JACKS: Hello?

HELEN JACKS: Yes?

EDWARD JACKS: Well, is he going to come down and talk to me or what?

HELEN JACKS: They won't let him talk to you.

EDWARD JACKS: They won't let him talk to me?

HELEN JACKS: No, but he's at—What is your neighbor's name? I can call him down there.

EDWARD JACKS: Best.

HELEN JACKS: I don't know. Do you know their phone number?

EDWARD JACKS: The first name is John. The last name is Best.

HELEN JACKS: B-E-S-T?

EDWARD JACKS: B-E-S-T.

HELEN JACKS: John?

EDWARD JACKS: Yea.

HELEN JACKS: Well, how come they let you call? Can't you call there?

EDWARD JACKS: Well, let me ask the men here if I can do that and we'll see. Is he down there now?

HELEN JACKS: Yes. He's next door. I just talked to him.

EDWARD JACKS: Okay. Well, I'll try it that way.

HELEN JACKS: Well, wait a minute now, he's trying to get a hold of a lawyer so if the phone's busy, that's why. Denny, I still can't believe it.

EDWARD JACKS: What do you want me to have? Am I supposed to do something, or what?

HELEN JACKS: I think you already did it.

EDWARD JACKS: Yea.

HELEN JACKS: She sure never deserved that.

EDWARD JACKS: Huh?

HELEN JACKS: She sure never deserved anything like that.

EDWARD JACKS: Push hard enough and it will break.

HELEN JACKS: Huh?

EDWARD JACKS: Push hard enough and it will break.

HELEN JACKS: Well, I begged you not to do it.

EDWARD JACKS: Well, we got a smart-ass brother saying he wanted an audience and all this kind of shit, that's what did it.

HELEN JACKS: Oh, come on now.

EDWARD JACKS: Sorry.

(R. 848-50)

During closing arguments, Prosecutor Cosentino again read the illegally intercepted telephone conversation between Jacks and his mother to the jury (R. 931, l.13, through 933, l.10).

Petitioner Edward D. Jacks maintains that, in law and in fact, there was not sufficient evidence adduced at his trial from which the jury could have found beyond a reasonable doubt that he was sane at the time of the alleged offense. The following summary demonstrates that the

evidence supportive of insanity was quite strong and that the evidence which might tend to show sanity was *at best* marginal, and not legally sufficient to sustain a conviction.

At the time of the homicide on August 28, 1975, Jacks and his wife had been married 11 years and 9 days. During that time, they moved 15-20 times, and Jacks held nearly a dozen different business-oriented jobs. (R. 668, 670). (All of his efforts were unsuccessful, except for one in Germany). (R. 673). After moving to Elkhart, Indiana, approximately two years before the homicide, Jacks was involved in marketing vacuum systems for mobile homes, selling life insurance, selling bullet-proof clothing, and marketing firearms. (R. 70-74). The bullet-proof clothing company had been in operation since 1839, but went defunct shortly after Jacks began working there. (R. 672). In November of 1974, he obtained a federal license to deal in various types of firearms, which he sold to police departments throughout the State and elsewhere and, eventually, began to sell on an international basis. (R. 684, 677). It was Jacks' ill-fated major international arms transaction which, the evidence shows, precipitated his mental crisis.

From early 1975, Jacks was intensely involved in attempting to effectuate a sale of arms which would have resulted in a commission of $100,000 to $150,000 to him. (R. 652-53, 677). On Sunday evening, August 24, 1975, Jacks went to this brother Robert's home near Chicago to spend the night before both left to Marietta, Georgia, on the following morning to finalize the arms transaction. The deal was never consummated, and Robert Jacks left Georgia the same day. Petitioner Edward Dennis Jacks, Jr., stayed an extra day, and then flew to O'Hare in Chicago, where his father met him at around 5:00 P.M. on Tuesday, August 26, 1975. (R. 654, 659). Jacks appeared

to be "beat," and stayed with his parents that night in Lake Forest, Illinois. (R. 660). His mother, Helen Jacks, testified that he was "terribly, terribly depressed" and that he "wasn't himself" that night. (R. 643). Jacks was unable to sleep at all that night and returned to his home in Elkhart on the following day, August 27, 1975. (R. 683-84).

Upon arriving at home, he took a long hot tub bath to try to relax and telephoned his wife to ask her if she could come home early. She did, and promptly informed him that she was getting a divorce, that she had rented an apartment to live in, and that she had obtained a restraining order prohibiting him from seeing or talking to their two young children. He begged her to reconsider, suggested they might seek professional counseling, and otherwise implored that their marriage not be cast aside, all to no avail. (R. 684-85).

Jacks telephoned his parents, advised them of this additional crushing blow to his life, and sought their advise and support. (R. 644, 661). Thereafter, Jacks telephoned a locksmith to change the locks on his home, ordered the burglar alarm coding system to be changed, and, with his legal arsenal of weapons in the home quite literally "built a fortress." (R. 686-87, 787). Jacks also telephoned his father and asked him to have a new will prepared for him and to have his brother bring it down to him the following morning. When Jacks' father replied that he did not believe that could be accomplished, the defendant replied, "Well, if he doesn't come down with a new will, he'll probably have to talk to the ccroner." (R. 662-63). At approximately 1:00 to 1:30 A.M. on August 28, 1975, the day of the homicide, Jacks telephoned Edward M. Hobson, who testified at trial as a defense witness. According to Hobson, Jacks made suicidal statements (R. 636, ll.19-20),

and his speech was not normal. (R. 637, ll.24-26). Hobson testified that, "His speech, he has a tendency before, I mean as I know him, whenever I've heard him on the phone or otherwise, he's decisive in his talk. He's got a type of voice that makes you listen. But he sounded, he just wasn't himself." (R. 638, ll.1-5).

State's witness Roger Moore testified that he had a telephone conversation with Jacks at approximately 9:30 A.M. on August 28, 1975, the day of the homicide. (R. 499). Witness Moore stated, on direct examination, that Jacks spoke with "(c)ompletely incoherent statements. He didn't even complete sentences. He could not, I feel at any time, complete a sentence after starting it. In other words, he would drop from one subject to another." (R. 501, ll.1-5).

The next State's witness, Ronnie Greenawalt, testified that he was at Jacks' house and spoke with him less than a half hour before the shooting and that when he saw Jacks "he (Jacks) was like looking at me but he was like looking through me." (R. 507, l.4). Witness Jack Feidler, who saw Jacks immediately after the shooting, testified that, "he appeared to me to be kind of, like in shock, or dazed or something. Of course, not knowing the man before I wouldn't really know, but he acted like he wasn't just thinking real clear." (R. 607). Jacks himself testified that he recalled seeing his wife pull up to their home in a car on the evening of August 28th and next recalled seeing her on the driveway on her back. He did not recall the actual shooting at all. (R. 693-93, 700 l.9).

Dr. John R. Adams, a defense-employed psychiatrist who was then head of the American Medical Association's Section on Psychiatry, testified at length. (R. 721-98). In pertinent part, Dr. Adams stated that Jacks' behavior controls at the time of the offense were, due to a "mental defect," so substantially impaired that Jacks could not conform his

behavior to the requirements of the law. (R. 744). The defense psychiatrist said when Jacks, at several times on August 28th prior to the homicide, advised several people that he would kill either himself or his wife, Jacks "was desperate" and calling out for help and that he was mentally "disintegrating." (R. 787). Jacks' sleep deprivation, his business failures, and the overwhelming shock of divorce made Jacks suffer distress and depression of a "profound nature," according to Dr. Adams. (R. 725-26, 796-97).

In rebuttal for the State, Dr. A.H. Urruti, a psychiatrist, opined that Jacks was "sane" at the time of the offense (R. 803) but admitted that Jacks had "partially impaired" control over his actions. (R. 805). Dr. Urruti, who on the State's re-direct examination volunteered that he takes "with a grain of salt" anything a criminal defendant tells him, *wholly and completely failed to testify to any factual basis for finding that Jacks was "sane."*

Dr. Frank Hogle, a psychiatrist who was also called during the State's rebuttal, testified that he had "no opinion" as to whether Jacks was sane at the time of the offense (R. 827, ll.12-16) because, in his opinion, there was a "relatively equal amount of evidence on both sides of that question." (R. 827, ll.18-19). On cross-examination by defense counsel, Dr. Hogle added that he had substantial doubts as to whether Jacks was sane at the time of the homicide. (R. 831).

Dr. George S. Westfall, a court-appointed *general practitioner* testified very briefly. (R. 850-63). He opined that Jacks was "not insane" at the time of the homicide (R. 854) but, as did Dr. Urruti, *failed to testify as to any factual basis whatsoever in support of his conclusion.*

Dr. Robert Yuhn, the second court-appointed psychiatrist, testified powerfully that Jacks was not sane at the time of the offense due to a "mental defect" which prevented him from being able to conform his conduct to the requirements of the law. (R. 877, 878, 899). Dr. Yuhn *testified at length as to the factual basis* for his opinion. Succinctly, Dr. Yuhn noted the physical indicia of mental stress, *i.e.* the cramps, diarrhea, laryngitis, loss of sleep, etc. These were among signs of "decompensation," a mental falling apart, that Jacks exemplified prior to the homicide. In addition, the quick combination of the unexpected business failure with the arms transaction and the shocking and unsuspected divorce action were mentally crushing to Jacks. Although he undoubtedly never consciously knew the reason for doing so, when Jacks changed the locks and burglar alarm system and surrounded himself with the legal arsenal already in his home-office, he was doing so in a sick attempt to prevent his already shattered ego controls from being further destroyed by external things.

Opinion by Judge Cummings

Judge Swygert dissenting

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
June 10, 1981.

Before
Hon. Luther M. Swygert, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Wesley E. Brown, Senior District Judge*

EDWARD DENNIS JACKS, JR.,
Petitioner-Appellant,

No. 80-1639 vs.

JACK R. DUCKWORTH, Warden,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. S79-308
Judge Allen Sharp

This cause was heard on the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, in accordance with the opinion of this Court filed this date.

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* The Honorable Wesley E. Brown, Senior District Judge of the District of Kansas, is sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 14, 1981.

Before
Hon. Walter J. Cummings, Chief Judge
Hon. Luther M. Swygert, Senior Circuit Judge
Hon. Wesley E. Brown, Senior District Judge*

EDWARD DENNIS JACKS, JR.,
Petitioner-Appellant,

No. 80-1639 vs.

JACK R. DUCKWORTH, Warden,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. S79-308
Allen Sharp, Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by petitioner-appellant Jacks, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel** has voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Wesley E. Brown, Senior District Judge of the District of Kansas, is sitting by designation.

** Judge Swygert voted to grant a rehearing.

APPENDIX C

ATTORNEYS FOR APPELLANT	ATTORNEYS FOR APPELLEE
Nile Stanton 1444 Consolidated Building Indianapolis, Indiana 46204	Theodore L. Sendak Attorney General of Indiana
Philip R. Melangton, Jr. 1430 Circle Tower Building Indianapolis, Indiana 46204	Dennis K. McKinney Deputy Attorney General 219 State House Indianapolis, Indiana 46204

IN THE

SUPREME COURT OF INDIANA

EDWARD DENNIS JACKS,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 777 S 525
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT

The Honorable Alphonse J. Spahn, Special Judge

PIVARNIK, J.

Defendant-appellant, Edward Dennis Jacks, Jr., was found guilty of first degree murder by a jury in Elkhart Superior Court on November 11, 1976. He was sentenced to life imprisonment. His motion to correct errors was overruled by the trial court and he brings this appeal. Appellant raises seven issues for our consideration, regarding:

(1) whether the trial court erred in admitting into evidence a tape recording of a telephone conversation between appellant and his mother; (2) whether the trial court erred in admitting into evidence a statement made by Jacks while in custody that he wished to consult with an attorney; (3) whether the trial court erred in refusing defendant's tendered verdict form pertaining to the insanity defense; (4) the sufficiency of the evidence with regard to defendant's sanity at the time of the offense charged; (5) rulings of the trial court concerning testimony during cross-examination of two expert witnesses; (6) whether the trial court erred in giving certain instructions; and (7) whether the closing argument by the prosecuting attorney was improper.

Edward Dennis Jacks, Jr., was a gun dealer who operated his business from his home in Elkhart, Indiana, where he resided with his wife and their two children. In August of 1975, he went to Marietta, Georgia, with his brother, an attorney from Illinois, to negotiate a transaction for the sale of a large number of guns to a foreign country. Jacks expected the sale to net him about $150,000. However, the deal fell through, and on August 27, 1975, appellant Jacks returned north and spent the night at his parents' home in Park Forest, Illinois. Appellant was depressed and upset because the deal had fallen through in Georgia. Early in the morning of August 28, 1975, he returned to his home in Elkhart. He called his wife at her place of employment and was advised by her that she had filed for divorce. She also told him she had obtained an apartment for herself and her children since he would need the home for his business, and that she had obtained a restraining order to prevent him from interfering with her custody of the children. He called his parents in Illinois and related this to them, although the evidence conflicted as to whether he called them more than once.

Witness Pat Munson was the director of the nursery school that appellant's children attended. Munson testified that appellant's wife, Kathleen Jacks, came to the school in the afternoon of August 28, and asked Munson to accompany her to the Jacks home to pick up some clothes and belongings. Mrs. Jacks was fearful of going to the home alone because appellant was upset with her about the divorce. Munson agreed that she would follow Kathleen Jacks in her automobile. When they arrived at the Jacks residence, Munson pulled up behind the Jacks automobile near the garage. Kathleen Jacks got out of her car and started toward the front door with her two children at her side. Pat Munson got out of her car and started toward the door, some twenty feet behind Mrs. Jacks. At this point, the front door opened and appellant stepped out of the house holding a rifle. Mrs. Jacks turned and started to run. Munson testified that appellant then began shooting at his wife. Munson said that the weapon was a rapid fire rifle, and that many shots were fired. Mrs. Jacks was struck by two bullets, and was pronounced dead at the Elkhart Hospital a short time later.

There was evidence that appellant Jacks had called acquaintances prior to this incident and told them he was going to kill his wife. Police officers who came to the scene testified that Jacks made statements to them of: "the damned gun jammed," and "she's been shot, get her out of here and take her to the hospital—you guys don't know what you're doing," and "Do you want to get shot, too?" to an ambulance attendant. Jacks' defense was that he was insane at the time this act was committed.

I.

Helen Jacks, mother of appellant, was called by the defense as a witness and told the jury, generally, about the

activities of August 27, when appellant stayed at her home, and about her conversations with him on the telephone after he returned home on August 28. There was some conflict as to whether she had talked to him more than once on the telephone on the 28th. On cross-examination, the prosecuting attorney asked Helen Jacks if it was not a fact that her son Edward Dennis told her on the telephone that he was going to kill his wife. She denied that such conversation took place. The prosecutor then asked her if she had had a telephone conversation with appellant on the evening of August 28, after he had been arrested. She stated that she did have such a conversation. She was then asked about statements made by appellant and her responses to those statements during the conversation. She stated that she did not recall some of the conversation and denied that other statements had been made. It became evident that the police had taped this telephone conversation and that the prosecution had the tape and a transcript of it in court with them.

The defendant also took the stand in his own defense. On cross-examination, he was asked about this conversation with his mother. He stated that he thought he had talked to her, but did not remember anything about the conversation. He testified that he was unable to remember any of the particular statements made by either of them on the phone.

Appellant testified that he had no memory of any of the events after he saw his wife drive into the driveway. He stated that he had a vague memory of seeing her lying on the sidewalk, but didn't remember how she got there. His memory of events at the police station was hazy, and he said he could not recall any of them.

After the defense rested, the State offered the tape recording into evidence to rebut the credibility of appellant's

mother, Helen Jacks, regarding her testimony concerning the telephone conversation. The tape recording was also offered to rebut appellant's credibility regarding his statements about his mental condition at the time. The court permitted the tape to be played to the jury after admonishing and instructing them that it could be considered only for the purpose of impeaching Helen Jacks' and appellant's credibility, and was not to be considered as evidence of the commission of the act.

The conversation was as follows:

"Helen Jacks: Hello?
Edwards Jacks: Hello.
Helen Jacks: Hello?
Edward Jacks: Mom?
Helen Jacks: Denny?
Edward Jacks: Hello.
Helen Jacks: Yes?
Edward Jacks: Where's Dad?
Helen Jacks: He's next door at your neighbor's.
Edward Jacks: Well, I'm in jail.
Helen Jacks: I know it. Well, how do you feel about that? That's what you wanted, wasn't it?
Edward Jacks: Hello?
Helen Jacks: Yes?
Edward Jacks: Well, is he going to come down and talk to me or what?
Helen Jacks: They won't let him talk to you.
Edward Jacks: They won't let him talk to me?
Helen Jacks: No, but he's at—what is your neighbor's name? I can call him down there.
Edward Jacks: Best.
Helen Jacks: I don't know. Do you know their phone number?
Edward Jacks: The first name is John. The last name is Best.
Helen Jacks: B-E-S-T?
Edward Jacks: B-E-S-T.
Helen Jacks: John?

Edward Jacks: Yea.

Helen Jacks: Well, how come they let you call? Can't you call there?

Edward Jacks: Well, let me ask the men here if I can to that and we'll see. Is he down there now?

Helen Jacks: Yes. He's next door. I just talked to him.

Edward Jacks: Okay. Well, I'll try it that way.

Helen Jacks: Well, wait a minute now, he's trying to get hold of a lawyer so if the phone's busy, that's why. Denny, I still can't believe it.

Edward Jacks: What do you want me to have? Am I supposed to do something, or what?

Helen Jacks: I think you already did it.

Edward Jacks: Yea.

Helen Jacks: She sure never deserved that.

Edward Jacks: Huh?

Helen Jacks: She sure never deserved anything like that.

Edward Jacks: Push hard enough and it will break.

Helen Jacks: Huh?

Edward Jacks: Push hard enough and it will break.

Helen Jacks: Well, I begged you not to do it.

Edward Jacks: Well, we got a smart-ass brother saying he wanted an audience and all this kind of shit, that's what did it.

Helen Jacks: Oh, come on now.

Edward Jacks: Sorry."

Record at 848-50. The defendant claims the taped conversation should have been excluded from evidence under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1970). § 2515 of the Act provides:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial . . . if the disclosure of that information would be in violation of this chapter."

The trial court allowed the recording to be played to the jury, relying on *United States* v. *Caron,* (5th Cir. 1973) 474 F.2d 506.

In *Caron,* the defendant had denied he was a gambler and that he ever gambled. The trial court admitted into evidence, for the limited purpose of rebutting defendant's testimony, an admittedly illegally wire-tapped telephone conversation between the defendant and a bookmaker, in which bets and wagers were being placed. The Fifth Circuit Court of Appeals affirmed, citing *Harris* v. *New York,* (1971) 401 U.S. 222, 99 S.Ct. 643, 28 L.Ed. 2d 1, and *Walder* v. *United States,* (1954) 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503. In *Walder,* the Supreme Court pointed out:

> "It is one thing to say that the government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the government's possession was obtained to his own advantage and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* v. *United States,* (1914) 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, doctrine would be a perversion of the Fourth Amendment."

Id. at 65, 74 S.Ct. at 356, 98 L.Ed. at 507. The court in *Caron, supra,* then noted that there is no justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the government's disability to challenge his credibility. 474 F.2d at 509.

Caron, supra, went on to hold that the result was not affected by the language of 18 U.S.C. § 2515. The court found that the legislative history of the Act clearly indicates that this section was not intended to exclude evidence under the present circumstances:

> "There is, however, no intention to change the attenuation rule. [Citations omitted.] Nor generally to press the scope of the suppression rule beyond present search and seizure law. *See Walder* v. *United States,* (1954) 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503."

S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* [1971] U.S. Code Cong. & Ad. News 2112, 2185. Thus, it is clear, as *Caron* held, that § 2515 was not intended to prevent the use of illegally obtained recordings of telephone conversations for impeachment purposes.

The facts and circumstances in this case are very similar to those of *Caron* and *Walder.* Therefore, we hold that the trial court properly admitted this tape recording into evidence with the limiting instructions that were given.

II.

A tape recording of a conversation that appellant Jacks had with a police officer, Miller, at the police station on the night he was arrested was admitted into evidence and played for the jury. This tape revealed a conversation between Miller and Jacks in which Miller advised Jacks of his constitutional rights pursuant to *Miranda* v. *Arizona,* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694. These were acknowledged by appellant Jacks and the conversation then continued as to the events of the evening. They discussed Jacks' employment and that of his wife, the fact that he was a licensed gun dealer, and the fact that his parents were coming from Illinois to join him there. Jacks also made the following statement to Miller: "I am not some kind of machine gun maniac or something like that, I didn't shoot my wife with a machine gun or anything else. And I would like them to understand that they are not scoring on some kind of a lunatic or something like that." After further discussion, Jacks then said to Officer

Miller: "As regards whatever happened this evening, I want to talk to my attorney." Officer Miller agreed, and the conversation then ended.

Appellant objects only to the admissibility of the last portion of the recording, in which he stated that he wanted to talk to his attorney before talking to the police any further. He argues that admitting this statement into evidence before the jury was prejudicial, in that his exercise of his constitutional rights to remain silent and have the assistance of counsel worked to his detriment in the eyes of the jury. He cites this Court's position in *Jones* v. *State*, (1976) 265 Ind. 447, 355 N.E.2d 402, which condemned the penalization of the accused's pre-trial silence, under *Doyle* v. *Ohio*, (1976) 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed. 2d 91. In *Doyle*, the Supreme Court held that it was violative of the due process clause of the Fourteenth Amendment for the prosecution to use an accused's post-arrest silence for impeachment purposes.

The admission of this recording into evidence did not violate the mandate of *Doyle* v. *Ohio* and *Jones* v. *State*. Those cases involved a situation where an accused's failure to deny or refusal to respond to accusations by police were used by the prosecution to impeach the defendant's trial testimony. *Doyle* and *Jones* noted that revealing the defendant's refusal or failure to respond or his request for an attorney before he responds to accusations would prejudicially penalize him for exercising his right to remain silent and have counsel present. The admission of the conversation in this case did not place appellant in that position. This statement was merely one of the many statements and responses made in the course of a rather lengthy discussion. During this discussion, appellant made certain statements concerning the events of the evening that amounted to admissions and denials. The conversation as

a whole was clearly admissible, and appellant does not dispute this fact. This statement was included in the recording to show the conclusion of the conversation. If it had been deleted, it is entirely possible that the jury would have been confused or misled by an abrupt halt in the conversation. Appellant was not prejudiced by the court's failure to delete this statement. We find no error as to this issue.

III.

Appellant alleges error in the trial court's refusal to submit his tendered verdict form to the jury. At the close of all of the evidence the defendant tendered a verdict form which read as follows: "We the jury find the defendant not guilty by reason of insanity, the State having failed to prove beyond a reasonable doubt that the defendant was sane on August 28, 1975." The court refused this tendered form, but did give instructions on the insanity defense and did submit a verdict form that authorized the jury to find the defendant not guilty by reason of insanity. Among its final instructions was one in which the trial court instructed the jury that if at the time of the crime defendant was insane then the jury must find him not guilty. The jury was therefore properly instructed and was furnished sufficient and proper verdict forms. *Pollard* v. *State,* (1979) ..... Ind. ....., 388 N.E.2d 496, 506; *Murphy* v. *State,* (1977) ..... Ind. ....., 369 N.E.2d 411, 417.

IV.

Appellant's next argument is that the State failed to prove beyond a reasonable doubt that he was legally sane at the time of the commission of the offense. This invites us to substitute our judgment for that of the jury's in weighing the evidence and judging the credibility of wit-

nesses. It would be improper for us to do this, and we have consistently refused to do so. *Taggart* v. *State*, (1979) ..... Ind. ....., 390 N.E.2d 657, 659; *Sypniewski* v. *State*, (1977) ..... Ind. ....., 368 N.E.2d 1359, 1363-64.

Conflicting expert and lay testimony was presented on this subject. The expert witnesses who testified on the issue of appellant's sanity were in conflict as to their findings. The State presented expert and lay evidence of defendant's sanity. Dr. George S. Westfall testified that he had examined defendant and determined that he was sane at the time of the murder. Kathryn Brown, an electroencephalogram technologist, testified that she spoke with defendant after the murder, when she was requested to give him a second test. She asked him why he was appearing for his second test, and he told her, "My attorney wanted me to go the insanity route, but I'm just as sane as anyone else."

The jury had ample facts before it and inferences to be drawn from those facts from which it could find beyond a reasonable doubt that the defendant was sane at the time of the commission of this act. There is no reason why we should disturb their verdict. This issue is without merit.

V.

Appellant alleges the State was allowed to improperly cross-examine two expert witnesses. The defendant called two psychiatrists as expert witnesses. On cross-examination, the prosecutor asked both of these witnesses, among other things, about their understanding and use of the term "mental defect." In their written reports and in their testimony, they had indicated that defendant was suffering from a "mental defect," and both indicated that the circumstances of stress facing the defendant created this mental defect. They stated that the defect was a form

of temporary insanity which rendered appellant incapable of conforming his actions to society or to the law.

The prosecutor questioned these witnesses in relation to the standard they understood should be applied, based on the definitions of "mental defect" and "mental disease" provided for in *Hill* v. *State,* (1969) 252 Ind. 601, 251 N.E. 2d 429. Under *Hill,* a mental disease is that which can improve or deteriorate, and a mental defect is a condition which is not considered capable of either improving or deteriorating. A mental defect may be either congenital or the result of injury, or the residual effect of a physical or mental disease. The prosecutor sought to inquire of these witnesses whether their use of the term "mental defect" was used in the context of these definitions, inasmuch as they had testified that appellant's mental defect was temporary because of oppressive circumstances and had improved immediately after the events of August 28, 1975. Both witnesses testified that this would not be their definition of a mental defect. They stated that, to them, a mental defect was a more general or generic term that had to do with temporary and fluctuating defects in the functions of the mental processes.

Based on the definitions set out in *Hill, supra,* the trial court permitted the prosecutor to examine these doctors to determine if they had used the Hill standards in their examinations and if their use of those terms employed those meanings. This was a proper subject of cross-examination, and the court did not err in allowing this line of questioning.

VI.

The appellant next claims error in the giving of several instructions, which we will consider individually. Court's instruction number thirteen, which dealt with criminal in-

tent, was not objected to by the defendant at the time it was given. He first raised objection to it in his motion to correct errors. Since he did not object at the time the instruction was given, any error is waived and we will not consider it. *Murphy* v. *State, supra; Bell* v. *State,* (1977) ..... Ind. ....., 366 N.E.2d 1156, 1160.

Appellant next complains of Court's instruction number twenty-two, which reads as follows:

> You are instructed that you are not bound by special definitions or conclusions as to what experts state is a mental disease or defect of the mind.
>
> What experts may consider a "mental disease or defect" where there (sic) concern is treatment, may or may not be the same as "mental disease or defect" for the jury's purpose in determining criminal responsibility.
>
> The term "mental disease" generally is used to denote a condition capable of either improving or deteriorating.
>
> The term "mental defect" generally is used to denote a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease.
>
> You are instructed that a "mental disease" or defect includes any abnormal condition of the mind which substantially impairs behavior controls.

Record at 240. We see no error in this instruction. This was a proper statement of the law under *Hill* v. *State,* (1969) 252 Ind. 601, 251 N.E.2d 429. The instruction also advised the jury that they were not bound by the conclusions and findings of the expert witnesses but could make their own determination as to the mental condition of the defendant based on the evidence. This is also consistent with *Hill, supra,* wherein we stated: "Extreme care must

be taken at this point to guarantee that the psychiatrists do not usurp the function of the jury. The jury should never be bound by definitions or conclusions of the experts as to what is a disease or defect." Id. at 615, 251 N.E.2d at 437. *See Sypniewski* v. *State, supra.*

State's tendered instruction number four, which was given by the court, was as follows:

> "You are instructed that the criminal law is an expression of the community's conscience or moral sense. It is important, therefore, to remember that when considering a defense to criminal responsibility, the mere proof that a certain mental condition existed at the time of the act, or that there is some causal connection between the mental state of the Defendant and the act itself is not enough. Rather there must be a showing that the Defendant's mind was so affected, he failed to recognize and appreciate his duty to society or (sic) complying with its code of acceptable behavior or that appreciating such fact, he lacked the capacity to conform his conduct to such requirements.
>
> You are further instructed that to be responsible within the meaning of the term "criminal responsibility" means (1) to be able to recognize and discharge various duties and (2) to be morally censurable for the voluntary breach of those duties and legally liable if their violations is (sic) forbidden by law."

Record at 273. The language of this instruction is taken from *Hill* v. *State, supra.* The mere fact that certain language or expressions are used in the opinions of this Court to reach its final conclusion does not make it proper language for instructions to a jury. Judicial opinions frequently include general background information and even specific data which are intended for use by legal technicians, but which are unnecessary to a proper set of jury instructions, State's instruction number four is of this nature and was unnecessary. It was, however, a reasonable

explanation in view of all the other instructions, including court's instruction number twenty-two, and was to be considered by the jury in conjunction with all other instructions. Under these circumstances it was not error to give instruction number four. *Sceifers* v. *State*, (1978) ..... Ind. ....., 373 N.E.2d 131, 135; *Brannum* v. *State*, (1977) ..... Ind. ....., 366 N.E.2d 1180, 1185.

Finally, appellant objects to the court's giving of State's tendered instruction number five, which reads as follows:

> "You are instructed that where a specific intent is required to make an act an offense, such as in the charge preferred against the Defendant, a purpose by direct evidence, for purpose and intent are subjective facts. That is, they exist within the mind of man, and since you cannot delve into a person's mind and determine his purpose and intent, you may look to all the surrounding circumstances, including what was said and done in relation thereto; that everyone is presumed to intend the natural and probable consequences of his voluntary acts, unless the circumstances are such to indicate the absence of such intent.
>
> When an unlawful act, however, is proved to be knowingly done, no further proof is needed on the part of the state in the absence of justifying or excusing facts, since the law presumes a criminal intent from an unlawful act knowingly done."

The only objection made to this instruction was as follows:

> "Objection to State's Instruction 5 because it's confusing by the presumption of the intention of natural and probable consequences of his acts when there is interposed herein the defense of insanity and there is no presumption of sanity. Therefore, at least the Court should have included the words "voluntary" and "sane act" within the last sentence of the first paragraph."

Record at 909.

It is appellant's position that this instruction virtually "demolished" his insanity defense because it was inconsistent with the other instructions and permitted the jury to presume the defendant was criminally responsible for his acts and therefore did not act because of his insane condition. As we have already stated above, the jury was amply and properly instructed on the issue of insanity. This was a general intent instruction which advised the jury how they were to handle the intent issue.

After this cause had been fully briefed and was pending before this Court, appellant brought to the attention of this Court a recent decision of the United States Supreme Court, *Sandstrom* v. *Montana,* (1979) ..... U.S. ....., 99 S.Ct. 2450. In the *Sandstrom* case, the trial court instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." Defense counsel objected, arguing that the instruction had the effect of shifting the burden of proof on the issue of intent ("purpose or knowledge") to the defense, which is impermissible under the due process clause of the Fourteenth Amendment. *Id.* at ....., 99 S.Ct. at 2453. The Supreme Court held in *Sandstrom* that where intent is a material element of the crime charged, this instruction may not be given. *Id.* at ....., 99 S.Ct. at 2459-60. As Sandstrom's attorney had argued, such an instruction may have the effect of shifting the burden of proof on this element to the defense. This shift is impermissible under *In re Winship,* (1970) 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368, and its progeny. *See Patterson* v. *New York,* (1977) 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed. 2d 281; *Mullaney* v. *Wilbur,* (1975) 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508.

In the case before us, this issue was not raised before the trial court or in the motion to correct errors. Further, however, it would appear the instruction given in this case

does not have either the conclusive or burden-shifting effect the Court found repugnant in the *Sandstrom* case. "Sandstrom's jurors were told that 'the law presumes that a person intends the ordinary consequences of his voluntary acts.' They were not told they had a choice or that they might infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory." ..... U.S. at ....., 99 S.Ct. at 2454. In the present case the trial court did make the statement found in *Sandstrom*. However, the court qualified it by stating that the jurors were to look to all of the surrounding circumstances, including what was said and done in relation to the acts, and that everyone is presumed to intend the natural consequences of his voluntary acts *unless* the circumstances are such as to indicate the absence of such intent. The second paragraph of State's instruction number five says that "[w]hen an unlawful act, however, is proved to be knowingly done, no further proof is needed on the part of the State *in the absence of justifying or excusing facts* . . . ." Record at 274 (emphasis added). Therefore, we do not feel that this instruction was as limited and mandatory in effect as the United States Supreme Court found the instruction in *Sandstrom* to be. We find no error as to this issue.

This is not to say that we are not mindful of the problems with the general type of instruction criticized by the Supreme Court in *Sandstrom* and other cases cited therein. We have approved instructions that jurors are justified in *inferring* intent from the use of a deadly weapon in a manner calculated to cause death or injury. *Dozier* v. *State*, (1976) ..... Ind. ....., 343 N.E.2d 783; *Pickerton* v. *State*, (1977) 258 Ind. 610, 283 N.E.2d 376. Allowing the jury to draw an inference from facts presented to it, however, is different from telling the jury the law presumes a fact. A

presumption is considered to be true unless and until proved otherwise; an inference is something drawn from a fact already proved. A proper instruction on the subject, then, would advise the jury that they may *infer* intent from certain proved acts of the defendant, and not that the law presumes that intent.

VII.

Appellant claims the prosecutor engaged in improper closing argument. Among other assertions, the prosecutor told the jurors that they were sitting in judgment in this case, they were the ones to make the decision, and they were the moral conscience of the community. He stated that when they read the newspapers about "this horrible thing" that happened, they may say to themselves, "Why don't they do something—why this happens here"—Where are the police, where are the prosecutors, where are the judges?", but in this case they have to ask themselves "Where is the jury?", because the jury is the one making the decision. In discussing the defense of insanity, the prosecutor stated that if they found the defendant not guilty by reason of insanity at the time the act was committed, and he was found to be sane at the present time, he would go free and be walking "the same streets" as the jurors. Record at 922-23. The court overruled appellant's motion for mistrial based on these remarks.

The defendant testified in his own defense in this case. He indicated that he had no memory of the actual occurrence of the event. There were a number of witnesses that refuted this statement, including Kathryn Brown, the electroencephalogram technologist, who stated that the defendant told her he was "going the insanity route" on the advice of his attorney. The State was arguing, in reviewing all these facts, that the defendant was, at the time of

his trial, feigning temporary insanity to escape responsibility for his acts. The prosecutor spent a great deal of time in his argument reviewing the testimony and evidence tending to show that the defendant was guilty and urged the jury to find him guilty on these grounds. The prosecutor's statements in this case were not necessary, nor are they commendable. The court should have admonished the jury to disregard them. However, in view of the facts and circumstances here, and the entire argument given by the prosecutor, which was not typified by these statements, we cannot say that these isolated statements put appellant in such grave peril that it warrants reversal of his conviction. *Rock* v. *State*, (1979) ..... Ind. ....., 388 N.E.2d 533, 536; *Hackett* v. *State*, (1977) 266 Ind. 103, 109, 360 N.E.2d 1000, 1003.

The judgment of the trial court is affirmed.

All Justices concur.

Opposition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-824

EDWARD DENNIS JACKS, JR.,

Petitioner,

vs.

JACK R. DUCKWORTH, Warden,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LINLEY E. PEARSON
Attorney General of Indiana
DAVID A. ARTHUR
Deputy Attorney General
DAVID L. STEINER
Deputy Attorney General
OFFICE OF ATTORNEY GENERAL
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6332

Central Publishing Company, Inc., Indianapolis, IN 46206

QUESTIONS PRESENTED FOR REVIEW

1. Whether the giving to the jury of State's Instruction No. 5, which dealt with the issue of intent, presents a question for review by this Court.

2. Whether the introduction into evidence of the last portion of a taped conversation between Petitioner and a police officer as played to the jury, which conversation occurred after proper *Miranda* warnings, presents a question for review by this Court.

3. Whether the use at trial for purposes of rebuttal and only after the presentation of the State's case in chief of a taped phone conversation between Petitioner and his mother which was concededly intercepted in violation of Title III of the Omnibus Crime Control Act of 1968 presents a question for review by this Court.

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IN THE

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Petitioner,

VS.

JACK R. DUCKWORTH, Warden,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent, Jack R. Duckworth, Warden, Indiana State Prison, respectfully prays this Court deny issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit), thereby refusing to review the decision entered by that Court in cause number 80-1639 on June 10, 1981.

OPINIONS BELOW

The opinion of the Supreme Court of Indiana, entered on September 26, 1979, is reported at 394 N.E.2d 166 and appears as Appendix C to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit (hereafter Petition).

The memorandum and order of the United States District Court for the Northern District of Indiana, South Bend Division (hereafter District Court), cause number S79-308, is reported at 486 F.Supp. 1366 and appears as Appendix B to the Petition.

The opinion of the Seventh Circuit, entered on June 10, 1981, is reported at 651 F.2d 480 and appears as Appendix A to the Petition.

JURISDICTION

The Respondent does not dispute the allegations of jurisdiction in this Court made by Petitioner.

STATEMENT OF THE CASE

I.
Nature of the Case

The Petition arises from the affirmance by the Seventh Circuit of a judgment and decision of the District Court denying a petition for a writ of habeas corpus filed by a person in state custody. Petitioner alleges that the Seventh Circuit and the District Court erred in finding no basis for relief in the giving of State's Instruction No. 5 and in the admission into evidence of part of a conversation between Petitioner and a police officer and a phone conversation between Petitioner and his mother.

II.
Course of Proceedings Below

Throughout this Brief, the Record of the Proceedings in the state courts will be cited as "R.".

The Petitioner, Edward Dennis Jacks, Jr., came home from a trip to Georgia and was told by his wife, Kathy, that she has filed for divorce. (R. 685). Kathy took their children to an apartment she had rented. (R. 685). On August 28, 1975, the day after Petitioner returned from his trip, Kathy went back to her home, where Petitioner was staying. (R.

373). Kathy took Pat Munson along with her, and Pat told Petitioner that they were coming. (R. 374). Kathy, her children and Pat drove to Petitioner's house, and Kathy went up to the door. (R. 381-382). Petitioner opened the door, and he had a gun in his hand. (R. 382). Petitioner shot Kathy with an assault rifle. (R. 382). When Petitioner turned the rifle toward Pat, she ran for her car. (R. 383). Petitioner shot one of Pat's tires out and then pointed the rifle at her windshield, as she backed her car out of the driveway. (R. 384). Kathy died as a result of the shooting. (R. 411, 568).

At the trial, in addition to Pat Munson, the State called a number of witnesses who observed Petitioner near the time of the shooting. Mark Miller and Harvey Miller, two ambulance attendants (R. 393, 400) arrived at the scene after the shooting (R. 393) and testified as to several comments made by Petitioner indicative of his sanity. (R. 395-396, 398, 401). Officer Snyder arrived at the scene, shortly after the shooting, and called for an ambulance. (R. 418). He heard Petitioner tell the firemen not to touch his wife as they were not doctors, but Snyder told him that she had to go to the hospital. (R. 418-419). He and Petitioner went inside, and Petitioner made a phone call. (R. 421). Jammed cartridges were found at the scene. (R. 464-465).

Barbara Best, Jacks' neighbor, heard Petitioner tell her dad before the shooting that when the policemen came to serve papers there might be trouble. (R. 485). She went to the scene after the shooting. (R. 486-487). Ronnie Greenawalt, who knew Petitioner, testified as to his contacts with Petitioner before the shooting. Jane Yoder, a Jacks' neighbor, testified that Petitioner, before the shooting, asked her to keep her kids away. (R. 520). Petitioner said he might blow his wife's head off and said his parents were flying down to restrain him. (R. 520). Ted Cover, another neighbor, noticed that Petitioner was relatively calm just after the shooting. (R. 532).

Petitioner told two officers, Bousson and Sharon, that the shooting had been accidental. (R. 539, 545). Officer Bousson heard Jacks on the telephone explaining that he was in trouble and needed help. (R. 538). Later, at the booking room of the police station, Petitioner told Officer Linton: "I shot my wife" and "I want to know how she is." (R. 548).

Kathryn Brown, an EEG technologist, testified that Petitioner told her he was back for a second test because"...his attorney had wanted to 'go the insanity route,' and he didn't want to go along with that." (R. 822)

Dr. Urruti and Dr. Westfall examined Petitioner as to his mental condition and testified at trial that in their opinions he was sane and could form the requisite intent at the time of the crime. (R. 798-804, 851-856).

During the trial, a tape of a conversation between Officer Miller and Petitioner was played to the jury. (R. 592-596). Prior to trial, Petitioner had moved to suppress this tape, and a hearing was held. (R. 342-362). Additional discussion occurred at trial, and the trial judge granted the motion to suppress, in part. (R. 554-555). Throughout proceedings below, the Petitioner has only objected to the playing of the final comment he made on the part of the tape allowed into evidence at trial.

On the night Petitioner was arrested, a telephone conversation between him and his mother was tape recorded without a court order. (R. 843). The tape was not used in the State's case but was used for impeachment purposes as to Petitioner's and his mother's credibility at trial, particularly as to the credibility of these witnesses with respect to the insanity defense. (R. 658, 838, 848). On rebuttal, the tape was admitted into evidence and played to the jury with limiting instructions. (R. 847-850).

Petitioner objected to the giving of State's Instruction No. 5 at trial but did not object to the giving of Court's Instruction No. 13. (R. 906, 908-909). The Supreme Court of Indiana specifically determined that Petitioner waived any

issue with respect to Court's Instruction No. 13 by failing to make a contemporaneous objection as required by Indiana procedural rules. *Jacks v. State*, 394 N.E.2d 166, 173 (Ind. 1979). The Petitioner, throughout the proceedings in the federal courts below, has made no effort to show the requisite cause and prejudice to avoid the waiver determination. *Wainwright v. Sykes*, 433 U.S. 72 (1977).

REASONS FOR DISALLOWANCE OF THE WRIT

I.

The Decision Below Does not Seriously Erode the *Sandstrom* Doctrine Invalidating any Shift of the State's Burden to Prove all Essential Elements of the Crime Charged and therefore Presents no Substantial Question for Review

In finding against Petitioner with respect to the giving of State's Instruction No. 5, the Seventh Circuit, after a thorough review of that instruction and the other relevant instructions given, properly determined that the "...instruction did not so infect the entire trial as to violate due process and invalidate the state court judgment," citing *Henderson v. Kibbe*, 431 U.S. 145 (1977). State's Instruction No. 5 read as follows:

> You are instructed that where a specific intent is required to make an act an offense, such as in the charge preferred against the Defendant, it is not always possible to prove a purpose by direct evidence, for purpose and intent are subjective facts. That is, they exist within the mind of man, and since you cannot delve into a person's mind and determine his purpose and intent, you may look to all the surrounding circumstances, including what was said and done in relation thereto; bearing in mind the presumption of law, that every one is presumed to intend the natural and probable consequences of his voluntary acts, unless the circumstances are such as to indicate the absence of such intent.

> When an unlawful act, however, is proved to be knowingly done, no further proof is needed on the part of the state in the absence of justifying or excusing facts, since the law presumes a criminal intent from an unlawful act knowingly done. (R. 274).

The primary reason Petitioner's challenge to this instruction presents no substantial basis for review is that the Seventh Circuit properly interpreted and applied the principles of *Sandstrom v. Montana*, 442 U.S. 510 (1979). The Seventh Circuit properly considered whether State's Instruction No. 5 had either a mandatory or burden-shifting effect, and found that the giving of that instruction, along with other pertinent instructions, did not have the impermissible effects described in *Sandstrom*. The simple fact is that State's Instruction No. 5, as read in Petitioner's case, is not at all the same as the instruction condemned in *Sandstrom*. As observed by the Seventh Circuit, any impermissible effect of the language that "everyone is presumed to intend the natural and probable consequences of his voluntary acts" was negated by the qualifying language of the instruction. *Jacks v. Duckworth*, 651 F.2d 480, 485-487 (7th Cir. 1981). The Seventh Circuit noted that:

> ...Instruction No. 5 does not contain a mandatory injunction to presume the requisite intent from the act committed since the jurors were told they could "look to all the surrounding circumstances, including what was said and done in relation thereto" and that any presumption of "a criminal intent from an unlawful act knowingly done" was rebuttable by "justifying or excusing facts." The absence of a mandatory effect in State's Instruction No. 5 is also shown by the qualifying phrase "unless the circumstances are such as to indicate the absence of * * * intent" which follows the reference to the presumption condemned in *Sandstrom* that everyone intends the natural and probable consequences of his voluntary acts. Since the qualifying phrases nullified the mandatory flavor of the language condemned in *Sandstrom*, Instruction

No. 5 did not dilute the State's burden of proof and the district court correctly held that there was no error committed in giving this instruction. Judge Sharp properly rested his conclusion on the following language from the Indiana Supreme Court herein:

> "Further, however, it would appear the instruction given in this case does not have either the conclusive or burden-shifting effect the Court found repugnant in the *Sandstrom* case. 'Sandstrom's jurors were told that the law presumes that a person intends the ordinary consequences of his voluntary acts.' They were not told they had a choice, or that they might infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory. 442 U.S. at 513, 99 S.Ct. at 2454. In the present case the trial court did make the statement found in *Sandstrom*. However, the court qualified it by stating that the jurors were to look to all of the surrounding circumstances, including what was said and done in relation to the acts, and that everyone is presumed to intend the natural consequences of his voluntary acts *unless* the circumstances are such as to indicate the absence of such intent. The second paragraph of State's instruction number five says that '[w]hen an unlawful act, however, is proved to be knowingly done, no further proof is needed on the part of the State *in the absence of justifying or excusing facts*....Record at 274 (emphasis added). Therefore, we do not feel that this instruction was as limited and mandatory in effect as the United States Supreme Court found the instruction in *Sandstrom* to be. We find no error as to this issue." 394 N.E.2d at 175.
>
> (*Id.*, at 485-486).

Morever, the Seventh Circuit properly examined other instructions with respect to this issue because "if the entire instructions given in a case make plain that 'the burden of proving every essential element of the crime charged * * *

was upon the prosecution,' there is no violation of the Due Process Clause." *Id.*, at 486; *United States v. Tecumseh*, 630 F.2d 749, 754 (10th Cir. 1980), *cert. denied*, 101 S.Ct. 376. Indeed, "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973). Instructions must be considered in the context of the entire trial record. *United States v. Park*, 421 U.S. 658, 674-675 (1975). The Seventh Circuit found that Instructions Nos. 1, 2, 3, 4, 5, 12, 14, 15, 18, 20 and 29 aided in clearly informing the jury that the State had the burden of proof on the intent issues beyond a reasonable doubt. *Jacks v. Duckworth*, *supra*, at 486-487. Thus, State's Instruction No. 5 presents no question for review, since the decision of the Seventh Circuit is consistent with the decisions of this Court.

Additionally, it should be noted that there is a substantial question whether the *Sandstrom* decision is even applicable to this case, since *Sandstrom* was decided in June, 1979, and Petitioner's trial occurred in November, 1976. See, *United States v. Spiegel*, 604 F.2d 961, 969 (5th Cir. 1979), *cert. denied*, 446 U.S. 935; *Jacks v. Duckworth*, *supra*, 485-486, footnote 5. It should also be observed that the Seventh Circuit found the evidence of Petitioner's guilt to be overwhelming and that error, if any, in the giving of Instruction No. 5 should be treated as harmless (beyond a reasonable doubt). *Id.*, at 487; see also, *Holloway v. McElroy*, 632 F.2d 605, 618 (5th Cir. 1980); *United States v. Bohlmann*, 625 F.2d 751, 753 (6th Cir. 1980). Contrary to Petitioner's claim, this Court in *Sandstrom* did not decide that an improper jury instruction on an element of the crime can never constitute harmless error, but instead, specifically declined to reach the harmless error issue. *Id.*, at 99 S.Ct. 2450, 2461.

II.

The Decision of the Seventh Circuit which found no Constitutional Error in the Admission into Evidence of a Single Comment by Petitioner During a Voluntary Conversation with a Police Officer does not Conflict with this Court's Precedents

Following the shooting of Petitioner's wife, Petitioner Jacks engaged in a conversation with Officer Miller at the police station. (R. 342-362). See, Appendix A to Majority Opinion, *Jacks v. Duckworth*, *supra*, at 488-489. At the outset of the conversation, the Petitioner was given his rights as required by *Miranda v. Arizona*, 384 U.S. 436, (1966). Thereafter, the Petitioner answered questions about his name, age and occupation and also made statements amounting to admissions or denials. As an example, Petitioner Jacks stated at one point that:

> I didn't shoot my wife with a machine gun or anything else. And I would like them to understand that they are not scoring on some kind of lunatic or something like that.
> (Appendix A to Majority Opinion, *Id.*, at 488).

The portion of the conversation admitted at trial concluded as follows:

> Mr. Jacks: As regards whatever happened this evening, I want to talk to my attorney.
>
> Mr. Miller: Okay.

Petitioner has complained about the admission of his last comment (above) into the evidence.

The Petitioner is clearly wrong in his contention that none of the conversation, as admitted at trial, had any significance except for the single sentence about which he has complained. A careful examination of the colloquy between Petitioner and Officer Miller reveals that in addition to any admissions or denials, the rational and

coherent statements made by Petitioner so near the time of the shooting were indicative of Petitioner's sanity when he shot his wife. It is correct that the prosecutor believed the conversation was relevant and material, but he did not especially emphasize the single statement of Petitioner: "As regards whatever happened this evening, I want to talk to my attorney." What the prosecutor did emphasize is that the Petitioner was rational and in control of his faculties a short time after the shooting. Clearly, the conversation was offered for much more than any prejudicial effect arising from the single sentence in question.

The fact is that the Seventh Circuit in its Opinion properly distinguished the case at bar from those cases cited by Petitioner, including *Doyle v. Ohio*, 426 U.S. 610 (1976); *United States v. Hale*, 422 U.S. 171 (1975); and *United States v. Matos*, 444 F.2d 1071 (7th Cir. 1971) as follows:

> However, neither *Doyle* nor *Hale* is applicable here because this case does not involve an attempt by the prosecutor to use petitioner's silence or failure to testify against him or for impeachment purposes. In fact, petitioner did not remain silent at the time of arrest. Rather, he spoke voluntarily and freely with Sergeant Miller after having received his *Miranda* warnings and even after having uttered the 13 words now in issue, thereby indicating that he was not then invoking his right to remain silent. *Jacks v. Duckworth, supra*, at 483.

As noted by the Seventh Circuit, the state trial judge exercised considerable caution in suppressing the portion of the conversation after the sentence in question. Yet, the conversation was quite clearly voluntary and as to the sentence in question:

> The trial judge left it in merely to mark the termination of the permissible evidence and that which became impermissible, he thought, after defendant first sought counsel. *Id.*, at 483.

Finally, it should be observed that the majority of the Seventh Circuit did not base its decision on harmless error. The Seventh Circuit did not find that the admission of the sentence resulted in a deprivation of constitutional rights. On the contrary, the Court properly found that:

> Consequently, it is obvious that appellate counsel for petitioner is now presenting a self-serving, unwarranted interpretation of a single sentence whose admission in nowise was a violation of petitioner's constitutional rights in that petitioner was not at that point invoking either his right to remain silent or his right to have counsel present. Indeed his right to counsel under the Sixth and Fourteenth Amendments had not attached because no adversary judicial proceedings had been initiated. *Moore v. Illinois*, 434 U.S. 220, 226-227, 98 S.Ct. 458, 463-464, 54 L.Ed.2d 424. The district court therefore correctly held that reversible error was not committed when this sentence was permitted into evidence without any misuse by the prosecutor. (*Id.*, at 483)

The decision of the Seventh Circuit is clearly consistent with decisions of this Court, and therefore, the Petitioner has failed to present a question for review as to his conversation with Officer Miller.

III.

The Taped Phone Conversation Between Petitioner and his Mother was Properly used at Petitioner's Trial, and such use Presents no Basis for Habeas Corpus Relief in the Circumstances of this Case

The Petitioner here is complaining that a taped conversation between himself and his mother was admitted and played at trial in violation of Section 2515 of Title III of the Omnibus Crime Control Act of 1968, 18 U.S.C. §2515. It is correct that the conversation was taped without a court order, and, consequently, as noted by the prosecutor at trial (R. 838), the conversation could not have been used initially

in the State's case in chief. *United States v. Giordano*, 416 U.S. 505 (1974). Yet it is also clear, as found by the Seventh Circuit, that the use of the conversation on cross-examination of Petitioner and his mother and on rebuttal was proper given the circumstances. *Jacks v. Duckworth*, 651 F.2d 480, 483-484 (7th Cir. 1981).

In the case at bar, the Petitioner and his mother were less than truthful as to conversations they had had shortly before the Petitioner shot his wife. This finding is implicit in the decision of the Seventh Circuit and express in the decisions of the District Court and the Supreme Court of Indiana. See, *Jacks v. Duckworth*, 486 F.Supp. 1366, 1369-1370 (D. Ind. 1980); *Jacks v. State*, 394 N.E.2d 166, 169-171 (Ind. 1979). Given this predicate, the Seventh Circuit correctly found that under *Harris v. New York*, 401 U.S. 222 (1971) and *United States v. Caron*, 474 F.2d 506 (5th Cir. 1973), the illegally taped conversation was properly admissible to rebut less than truthful testimony on the part of defense witnesses. *Jacks v. Duckworth*, *supra*, at 483-484 (7th Cir.).

In the *Caron* case the court carefully examined the legislative history of Title III of the Omnibus Crime Control Act of 1968, and quoted from the Senate Report on the bill as follows:

> Section 2515 of the new chapter imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter. It provides that intercepted wire or oral communications or evidence derived therefrom may not be received in evidence in any proceeding before any court....
>
> The provision must, of course, be read in light of section 2518(10)(a) discussed below, which defines the class entitled to make a motion to suppress. It largely reflects existing law. It applies to suppress evidence directly or indirectly obtained in violation of this chapter. [citations omitted]. There is, however, no intention to change the attenuation rule. [citations

> omitted]. *Nor generally to press the scope of the suppression role* [sic] *beyond present search and seizure law.* See *Walder v. United States*, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954). S.Rep. No. 1097 U.S. Code Cong. and Admin. News (90th Cong., 2d Sess., 1968), pp. 2184-2185. (Emphasis added). (*Id.*, at 509-510).

The *Caron* decision was based primarily on *Walder v. United States*, 347 U.S. 62 (1954), wherein this Court noted that:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.
> (*Id.*, at 65)

The rationale of the *Walder* case has been repeatedly affirmed by this Court. See, *Harris v. New York, supra; Oregon v. Hass*, 420 U.S. 714 (1975); and *United States v. Havens*, 446 U.S. 620 (1980). Thus, it is clear that Petitioner's argument is contrary to the legislative history of the wiretap statute and a long line of precedent allowing the use of illegally obtained information on rebuttal.

Furthermore, the Seventh Circuit properly found that the instructions given the jury regarding the conversation between Petitioner and his mother were not improper. *Jacks v. Duckworth, supra*, 484 (7th Cir.). The state trial judge "...admonished the jury that the contents of the tape should be considered only to determine the credibility of petitioner and his mother and on the issue of petitioner's sanity, but not as to whether petitioner committed the crime charged." As a practical matter, the State submits that the instructions informed the jury that the evidence of the conversations could only be considered for the purpose

of impeaching the testimony of Petitioner and his mother with respect to the insanity defense. In any event, the Seventh Circuit correctly noted that given the predicate of the untruthful testimony and the fact that the essential issue in the case was the Petitioner's sanity at the time of the crime, the instructions with respect to the sanity issue were proper, citing *United States v. Stewart*, 443 F.2d 1129 (10th Cir. 1971). *Jacks v. Duckworth*, *supra*, at 484 (7th Cir.). In *Stewart*, an illegally recorded tape was permitted into evidence only on rebuttal. The predicate for the admission of the evidence in *Stewart* was similar to *United States v. Caron*, *supra*, and *Harris v. New York*, *supra*.

In any event, the Seventh Circuit correctly held that Petitioner's Title III claim was not cognizable in a habeas corpus proceeding under 28 U.S.C. §2254, "where as here the defendant had received a sufficient hearing in state court on his suppression claims, so that his custody was not inconsistent with the rudimentary demands of fair procedure and did not constitute a complete miscarriage of justice," citing *Hussong v. Warden, Wisconsin State Reformatory*, 623 F.2d 1185 (7th Cir. 1980). *Jacks v. Duckworth*, *supra*, at 485 (7th Cir.). The Seventh Circuit clearly did not find that a Title III claim can never present a basis for habeas corpus relief but merely found that the basis for such a claim was not present in Petitioner's case. Significantly, the very standards utilized by the Seventh Circuit in evaluating Petitioner's nonconstitutional Title III claim were directly taken from the decisions of this Court dealing with collateral relief for nonconstitutional claims. *Hussong v. Warden, Wisconsin State Reformatory*, *supra*, at 1190-1191. The fact is that the Petitioner received a full and fair hearing in the Indiana courts on his Title III claim and has failed to demonstrate how his incarceration for murder constitutes a complete miscarriage of justice. Indeed, to this point, no court has found any merit in his Title III claim. Clearly, the decision of the Seventh Circuit is consistent with decisions of this Court, and Petitioner's Title III claim presents no question for review.

CONCLUSION

For the foregoing reasons, it is respectfully urged that a writ of certiorari be denied.

Respectfully sumitted,

LINLEY E. PEARSON
Attorney General of Indiana

DAVID A. ARTHUR
Deputy Attorney General

DAVID L. STEINER
Deputy Attorney General

OFFICE OF ATTORNEY GENERAL
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6332

Attorneys for Respondents